(3)

Supreme Court, U.S.
FILED
FEB 2 2 2005
OFFICE OF THE CLERK

No. 04-637

In The Supreme Court Of The United States

MARGARET BRADSHAW, Warden,

Petitioner,

v.

JOHN DAVID STUMPF,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ALAN M. FREEDMAN*
**Counsel of Record*
CAROL R. HEISE
Midwest Center for Justice
831 Main Street
Evanston, IL. 60202
847-492-1563
847-492-1861 fax
Counsel for Respondent

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
**Counsel of Record*
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 8, 2004
CERTIORARI GRANTED: JANUARY 7, 2005

TABLE OF CONTENTS

Selected Docket Entries **Page**

Stumpf v. Anderson, No. 1:96-CV-0068-GCS-TPK
(U. S. District Court for the Southern District of Ohio
(Cincinnati)) 1

Stumpf v. Mitchell, No. 01-3613
(U. S. Court of Appeals for the Sixth Circuit) 7

Lower Court Opinions

Stumpf v. Anderson, No. C-1-96-668
(U.S. District Court for the Southern District
of Ohio, Eastern Division), Judgment,
Opinion and Order of February 7, 2001 9

Excerpt from Stumpf's 6th Circuit Brief,
at pages 63–73 108

Items from Stumpf's State Court Trial

Indictment against Stumpf, District Court
Record No. 13 (R.13), Return of Writ,
at Ex. A 117

State's July 1985 response to Stumpf's motion
to withdraw guilty plea, R.13, at Ex. J 122

Transcript Excerpts from Stumpf's Trial

Transcript of September 17, 1984 plea
hearing, R.13, Transcript of 9/17/84 to 9/24/84 128

Transcript of defense motions after hearing on factual basis for the plea, and Court ruling, R. 13, Transcript of 9/17/84 to 9/24/84 156

Transcript of arguments of counsel after Stumpf's mitigation (sentencing) hearing, and decision, R. 13, Transcript of 9/17/84 to 9/24/84 172

Excerpt from transcript of October 1, 1985 hearing on Stumpf's motion to withdraw guilty plea, R. 13, Transcript of October 1, 1985 203

Transcript Excerpts from Clyde Daniel Wesley's Trial

Transcript of State's opening statement, R. 33, Transcript of Wesley Trial, April–May 1985 215

Testimony of James Eastman (Wesley's cellmate), R. 33, Transcript of Wesley Trial, April–May 1985 231

Transcript of State's closing arguments (initial and rebuttal) at guilt phase of Wesley's trial, District Court Record No. 42, Transcript of Wesley trial, April–May 1985 265

Exhibits (from Stumpf's State Post-Conviction Review Petition)

Affidavit of John David Stumpf, R. 13, Ex. KK (Petition to Vacate or Set Aside Sentence), at Ex. MM 301

Affidavit of Charlotte Gilbert, R. 13, Ex. KK, at Ex. E 305

Affidavit of Scott P. Kenney, R. 13, Ex. KK, at Ex. F 309

Affidavit of Lesa Wood, R. 13, Ex. KK, at Ex. M 312

[The following reproduction includes
only selected docket entries.]

United States District Court
For The Southern District Of Ohio (Cincinnati)
Civil Docket For Case #: 1:96-CV-00668-GCS-TPK

Stumpf v. Anderson

DOCKET ENTRIES

Filing Date	#	Docket Text
11/16/1995	1	APPLICATION by petitioner John David Stumpf to proceed in forma pauperis.
11/16/1995	2	PETITION FOR WRIT OF HABEAS CORPUS (referred to Mag. Judge Terence P. Kemp).
11/20/1995	3	MOTION by petitioner John David Stumpf for appointment of counsel.
01/24/1996	4	ORDER by Lesley Brooks Wells granting motion for appointment of counsel [3-1], granting motion to proceed in forma pauperis [1-1].

01/26/1996	5	CJA (30) Appointing atty for petitioner Joh[n] David St[u]mpf. David L Doughten and Carla M. Tricarichi.
03/13/1996	6	ORDER OF TRANSFER by Judge Lesley B. Wells - Case tranferred to SDO East Div - Columbus.

* * *

10/08/1996	13	RETURN OF WRIT by respondent Carl Anderson to habeas corpus petition [2-1] (treated as motion to dismiss).

* * *

11/09/1999	20	MEMORANDUM, OPINION, AND ORDER: by Judge George C. Smith waiving Claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, Claim 3 and that portion of the second of petitioner's fifth claims; claim 1.17 an[d] that portion of the fifth claim which raises ineffective assistance of counsel for failing to develop the record as to the involuntary nature of petitioner's guilty plea have not been waived of the habeas corpus petition.
03/09/2000	21	ATTORNEY SUBSTITUTION: terminating attorney Stuart W Harris for Carl Anderson, attorney Sharon A McClellan for Carl Anderson and substituting attorney Jon William Oebker, Charles L Wille.

09/11/2000	22	ORDER by Mag. Judge Terence P. Kemp Case mgmt ddl /supply briefs due 10/1/00 by petitioner & respondent each party to file reply brief 10 days after initial suppl brief is filed.
09/29/2000	23	SUPPLEMENTAL BRIEF FILED by respondent Carl Anderson regarding the impact of Smith v. Goose in response to Scheduling order Case mgmt ddl /supply briefs due 10/1/00 by & respondent [22-1], regarding order [22-2].
10/02/2000	24	BRIEF FILED by petitioner John David Stumpf regarding Scheduling order Case mgmt ddl /supply briefs due 10/1/00 petitioner & respondent [22-1], regarding order [22-2].
10/02/2000	25	Supplement by respondent Carl Anderson re brief.
10/17/2000	26	REPLY BRIEF FILED by respondent Carl Anderson regarding the impact of Smith v. Goose Scheduling order Case mgmt ddl /supply briefs due 10/1/00 by & respondent [22-1], regarding order [22-2].
02/07/2001	27	OPINTON AND ORDER: by Judge George C. Smith finding that the Petitioner's remaining claims are without merit. All of Petnr's claims are DENIED and this action is

		DISMISSED. dismissing case ; Petnr is directed to file with this Court, in accordance with his suppl brief filed 10/2/00 and w/i 30 days, the transcript of Clyde Daniel Wesley's trial; petnr motion to file a suppl brief on merits of petnr's claims is DENIED as moot
02/07/2001	28	JUDGMENT: entered denying all of petitioner's claims and dismissing this action dismissing case.
02/07/2001		Copy of Order/Jgmt mailed to U.S. Supreme Court, US Appeals Court, Ohio Public Defender, Ohio Attorney General and Warden.
02/15/2001		Mail Returned, addressed to Carla Tricarichi
02/22/2001	29	MOTION by petitioner John David Stumpf to alter judgment.
03/14/2001	30	MOTION by petitioner John David Stumpf for leave to [e]xpand the record to include trial transcripts of Clyde Daniel Wesley.
03/15/2001	31	RESPONSE (memo in opposition) by respondent Carl Anderson to petitioner's motion to alter judgment.
04/09/2001	32	ORDER by Mag. Judge Terence P. Kemp granting motion for leave to expand the record to include trial transcripts of Clyde Daniel Wesley.

04/09/2001	33	STATE COURT TRIAL TRANSCRIPT filed by petitioner John David Stumpf(6 volumes).
05/01/2001	34	OPINION AND ORDER by Judge George C. Smith denying motion to alter judgment [28-2] judgment [29-1].
05/30/2001	35	NOTICE OF APPEAL by petitioner John David Stumpf from Dist. Court decision [34-1] of 5/1/01.
05/30/2001		APPEAL FEE unpaid.
05/31/2001		APPEAL NOTIFICATION issued CA.
06/06/2001		RECEIPT OF USCA APPEAL NUMBER - Number Assigned: 01-3613.
07/12/2001	36	OPINION AND ORDER by Judge George C. Smith; petitioner may proceed IFP on appeal.
06/07/2002		RECORD CERTIFIED to USCA 6th: 2 volumes of pleadings and 5 black folders containing state court transcripts and exh; and 1 brown folder containing vol 1 & 2 of state court transcripts.
04/29/2004	37	USCA INFORMATION COPY re [35] Notice of Appeal: it is ordered that the judgment of the district court us reversed and the case remanded for

		further proceedings consistent with the opinion of this court. (Attachments: # 1 Information Copy continued).
04/29/2004	38	USCA JUDGMENT As to[35] Notice of Appeal filed by John David Stumpf: the USCA orders that the judgment of the district court is reversed and the case is remanded for further proceedings consistent with the opinion of this court.
11/24/2004	39	NOTICE FROM U.S. SUPREME COURT re [35] Notice of Appeal: Assignment of Case #04-637
01/14/2005	40	ORDER of USCA for mtn on IFP is granted as to # [35] Notice of Appeal filed by John David Stumpf.
02/04/2005	41	Joint MOTION to supplement the record by Petitioner John David Stumpf, Respondent Carl Anderson.
02/09/2005	42	ORDER granting # 41 Motion to transfer transcript to the United States Court of Appeals for the Sixth Circuit. Signed by Judge Terence P Kemp on 2/09/05.
02/09/2005	43	Remark Mailed transcripts per order #42 to the United States District Court of Appeals Sixth Circuit.

[The following reproduction includes only selected docket entries.]

GENERAL DOCKET
U. S. Court of Appeals for the Sixth Circuit

No. 01-3613

JOHN DAVID STUMPF, Petitioner - Appellant

v.

BETTY MITCHELL, Warden, Respondent-Appellee

DOCKET ENTRIES

Date	Docket Text
6/5/01	Death Penalty Case Docketed, with certificate of appealability pending in District Court. Notice filed by Appellant John David Stumpf. Transcript needed.
	* * *
7/12/01	Copy of District Court Order filed to grant a certificate of appealability.
	* * *
12/11/02	CAUSE ARGUED on 12/11/02.
	* * *

4/28/04	OPINION filed: REVERSED and remanded [01-3613], decision for publication pursuant to local rule 206 [01-3613].
4/28/04	JUDGMENT: REVERSED and remanded.
	* * *
5/12/04	PETITION for en banc rehearing filed by Stephen E. Maher for Appellee Betty Mitchell.
	* * *
8/9/04	ORDER filed denying petition for en banc rehearing.
	* * *
9/9/04	Appellee MOTION filed to stay mandate pending the filing of a writ of certiorari.
	* * *
9/16/04	ORDER filed granting motion to stay mandate.
11/16/04	U.S. Supreme Court notice filed regarding petition for writ of certiorari.
	* * *
1/13/05	U.S. Supreme Court letter filed granting petition for writ of certiorari filed by Betty Mitchell, and motion for leave to proceed in forma pauperis granted. Supreme Court No. 04-637 [01-3613]. Filed in the Supreme Court on 01-07-05.

UNITED STATES DISTRICT COURT
Southern District of Ohio

JUDGMENT IN A CIVIL CASE

JOHN DAVID STUMPF

vs. Case No. C1-96-668

CARL ANDERSON, Warden JUDGE SMITH
Magistrate Judge Kemp

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☒ Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order of February 7, 2001, all of the Petitioner's claims are DENIED and this action is DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with the supplemental brief filed on October 2, 2000, (doc.no.24, at 2 n.2) and within thirty days from the date of this Order, the transcript from Clyde Daniel Wesley's trial.

Date: February 7, 2001 Kenneth J. Murphy, Clerk

By: /s/ Peg Lambert
Peg Lambert, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DAVID STUMPF,

Petitioner,

v. Case No. C-1-96-668
JUDGE SMITH
CARL ANDERSON, Warden, Magistrate Judge Kemp

Respondent.

OPINION AND ORDER

Petitioner, a state prisoner sentenced to death by the State of Ohio following his plea of guilty to a charge of capital murder, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. On November 9, 1999, this Court issued an Opinion and Order finding that the following claims were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5a. This matter is now before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the state court record for a determination of the merits of petitioner's remaining claims.[1] The facts of this case are set forth in the Opinion and Order of November 9, 1999, and will be repeated here only to the extent needed to provide context for petitioner's merits arguments.

First Claim for Relief

In his first claim for relief, petitioner mounts a

---

[1] Also before the Court are supplemental briefs filed by the parties pursuant to an order from this Court dated September 11, 2000. (Order, 09/11/200, doc. no. 22).

general attack on the constitutionality of Ohio's death penalty statute, both on its face and as applied to him. The Court will address only those allegations that were properly presented to the Ohio courts, *i.e.*, claims 1.1, 1.3, 1.5, 1.7, 1.8, 1.9, 1.11, 1.13, 1.15, 1.16, 1.17, and 1.18.[2] To the extent that petitioner might be arguing that the imposition of the death penalty is unconstitutional under all circumstances, the United States Supreme Court has rejected that argument. *Gregg v. Georgia,* 428 U.S. 153 (1976).

1.1 Uncontrolled Discretion of Prosecutors in Indictment Decisions

In the first sub-part of his first claim for relief, petitioner argues that the uncontrolled discretion of prosecutors in indictment decisions allows for arbitrary and discriminatory imposition of the death penalty. *Petition,* at ¶11. This argument finds no support in the law.

Ohio's scheme is not rendered unconstitutional by the discretion that prosecutors enjoy in deciding whom to charge with a capital offense. In fact, the Supreme Court rejected a similar argument in *Gregg* by distinguishing between discretion that is exercised by a sentencing body and discretion that is exercised by various individuals or bodies in earlier stages of the criminal process. In *Gregg,* the petitioner complained that the discretion exercised throughout stages other than the sentencing stage allowed for arbitrary and capricious imposition of the death penalty. Specifically, the petitioner noted that prosecutors had unfettered discretion to select those persons whom they wished to prosecute for a capital offense, that a jury may

---

[2] In its previous Opinion and Order, the Court held that the following sub-parts of petitioner's first claim for relief were barred by procedural default: 1.2, 1.4, 1.6, 1.10, 1.12, and 1.14.

choose at trial to convict the defendant of a lesser included offense rather than a crime punishable by death, and that a defendant sentenced to death could have his sentence commuted by the governor and state board of pardons and paroles. The Supreme Court rejected this argument, explaining that:

> [T]he existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Gregg, supra, 428 U.S. at 199. The fact that a prosecutor has the power not to charge capital felonies does not indicate that the prosecutor exercises his discretion in a standard-less manner that violates the Constitution. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated by factors other than the strength of their case and the likelihood that the jury will recommend death. Petitioner's argument to the contrary is unsupported by controlling law.

1.3 "Felony Murder" Aggravating Circumstance Does Not Narrow Offenders

In the third sub-part of his first claim for relief, petitioner argues that the "felony murder" aggravating circumstance set forth in R.C. §2929.04(A)(7) is duplicative of the general definition of aggravated murder, and

accordingly, does not distinguish capital murderers from other murderers. Petitioner reasons that Ohio's felony murder statutory provisions are constitutionally infirm because, by allowing an aggravating circumstance merely to repeat an element of the offense of aggravated murder, the statutory scheme does not genuinely narrow the class of death-eligible offenders. *Petition* at ¶14. This argument appears to be foreclosed by Supreme Court precedent.

The overriding constitutional concern is that the capital sentencing scheme in question genuinely narrows the class of persons eligible for the death penalty. *Zant v. Stephens,* 462 U.S. 862, 877 (1983). In *Lowenfeld v. Phelps, supra,* 484 U.S. at 236, the Supreme Court concluded, with respect to capital schemes that utilize aggravating factors to narrow the class of death-eligible offenders, that an aggravating factor which merely repeats an element of the crime will withstand constitutional scrutiny, so long as it narrows the jury's discretion. Ohio's scheme does not authorize an automatic, mandatory death penalty for felony murders *without more* -- namely, that the killing be purposeful, and that either the defendant be the principal offender in the aggravated murder or that the aggravated murder have been committed with prior calculation and design.

First, the class of felonies qualifying under felony murder is limited and, on top of that, the killing must be purposeful. Section 2903.01(B) of the Ohio Revised Code, as it existed when petitioner was indicted and convicted, defined the "felony murder" class of aggravated murder as purposely causing the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnaping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Moreover, assuming the defendant is convicted of aggravated murder as defined above, he is not eligible for the death penalty unless at least one aggravating circumstance is also established beyond a reasonable doubt. One such aggravating circumstance, set forth in R.C. §2929.04(7), exists if the aggravated murder was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnaping, rape, aggravated arson, aggravated robbery, or aggravated burglary, ***and*** either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. That these felonies overlap with most of the felonies set forth in the "felony murder" class of aggravated murders set forth in R.C. §2903.01(B) does not undermine the ability of the scheme to genuinely narrow the class of death-eligible offenders. Accordingly, the Court is not persuaded that Ohio's felony murder scheme is constitutionally infirm in the manner urged by petitioner. This argument also appears to be foreclosed by the Court of Appeals' decisions in *Scott v. Mitchell,* 209 F.3d 854, 885 (6th Cir.), *cert. denied,* 121 S.Ct. 588 (2000), and *Byrd v. Collins,* 209 F.3d 486, 539 (6th Cir.), *r'ng en banc denied,* 227 F.3d 756 (6th Cir. 2000), *cert. denied,* -- S.Ct. -- , 2001 WL 12722 (January 8, 2001).

1.5 Statute Does Not Require Specific Intent to Kill

In the fifth sub-part of his first claim for relief, petitioner argues that Ohio's statutory scheme is constitutionally infirm for failing to require the conscious desire to kill, or premeditation and deliberation, as the culpable mental state. This omission, petitioner reasons, is tantamount to a mandatory death scheme and effectively shields from judicial review the process of deciding who is to be sentenced to death. *Petition* at ¶16.

The crux of petitioner's argument is that Ohio's death penalty statute does not meet the constitutional prohibition against arbitrary and capricious infliction of the death penalty, in part, because it fails to require the conscious desire to kill or premeditation and deliberation as the culpable mental state. Ohio's scheme is not rendered unconstitutional by the absence of a requirement of premeditation or deliberation, since the Constitution contains no such requirement. *See Enmund v. Florida*, 458 U.S. 782, 790 n.7 (1982). Furthermore, capital punishment in Ohio is authorized only when a defendant has been found guilty of aggravated murder, (which is defined as ***purposely*** causing the death of another, either with prior calculation and design or in conjunction with one or more statutorily-enumerated felonies), and at least one statutorily-defined aggravating circumstance. For all of these reasons, petitioner's argument alleging the lack of specific standards in Ohio's death penalty statutes must be rejected.

1.7 State Not Required To Prove Absence of Mitigating Factors

In the seventh sub-part, petitioner argues that Ohio's death penalty is unconstitutional because the State is not required to prove the absence of mitigating factors and or that death is the only appropriate penalty, which essentially results in a mandatory death penalty scheme. *Petition* at ¶18.

The Constitution does not prohibit states from requiring capital defendants to prove mitigation evidence by preponderance of the evidence, so long as the State's burden of proving aggravating circumstances beyond reasonable doubt is not lessened. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1990)(plurality); *see also Lockett v. Ohio*, 438 U.S. 586, 609 and n.16 (1978)(plurality)(leaving intact the requirement that the defendant prove the existence of mitigating factors by a preponderance of evidence). Further, although the Ohio

Supreme Court has equated the defendant's "burden of going forward" with mitigating evidence with proving that mitigating evidence by a preponderance of the evidence, *see State v. Jenkins*, 15 Ohio St. 3d 164, 171-72 (1984); *see also State v. Stumpf*, 32 Ohio St. 3d 95, 101-102 (1987), the statutory provision gives the defendant "great latitude" in doing so. *See* R.C. §2929.03(D)(1). In sum, it is not *per se* unconstitutional to place on the defendant the burden of proving existence of mitigating factors, and in Ohio, the State still bears the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

Petitioner's argument that Ohio's death penalty statute is unconstitutional because it does not require the State to prove that death is the only appropriate sentence finds no support in the law. "Appropriateness" of the death penalty describes the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *California v. Ramos*, 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, appropriateness of the death penalty is determined when the sentencing body, having already found that a defendant convicted of aggravated murder is death-eligible because one or more aggravating circumstances has been proven beyond a reasonable doubt, undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. Petitioner has not demonstrated, and it is not otherwise apparent to the Court, that the "appropriateness" review embodied in Ohio's scheme is constitutionally infirm simply because the State is not "required to prove that death is the only appropriate penalty."

1.8 No Method for Proper Weighing of Aggravating and Mitigating Factors

Another constitutional infirmity advanced by petitioner is that no method exists to ensure a proper "weighing and consideration" is accomplished. This, petitioner reasons, devalues the importance of mitigation and tilts the process in favor of death. *Petition* at ¶18.

The Constitution does not require that "numeric weights" be assigned to aggravating circumstances and mitigating factors, or that the aggravating circumstances *substantially* outweigh the mitigation factors, but rather requires only that the sentencer's discretion be directed and limited enough to prevent wholly arbitrary and capricious action. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994); *see also California v. Ramos*, 463 U.S. 992, 1008-1009 n.22 (1983); *Zant v. Stevens*, 462 U.S. 862, 875 (1983); *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). Ohio's scheme sufficiently enumerates specific factors that the sentencer must evaluate, and a general framework for that evaluation. Ohio provides a detailed, structured scheme under which: (1) the death penalty for aggravated murder is prohibited unless at least one of eight aggravating circumstances is specified in the indictment and proven beyond a reasonable doubt; after which (2) the defendant has great latitude in second phase to go forward with mitigation evidence; and (3) the prosecutor proves beyond a reasonable doubt in second phase that the aggravating circumstances outweigh mitigating factors; after which (4) the trial court undertakes its own, independent review of the aggravating circumstances and mitigating factors. In sum, the Court is not persuaded that Ohio's death penalty statute is unconstitutionally vague or permits arbitrary and capricious infliction of the death penalty through an inadequate "appropriateness" determination.

1.9 Defendant Bears Burden of Proving Mitigation By Preponderance

In the ninth sub-part of his first claim for relief, petitioner argues that Ohio's death penalty scheme is unconstitutional because the, defendant is required to prove the existence of mitigating circumstances by a preponderance of the evidence. Petitioner reasons that this requirement prevents the sentencer from considering relevant mitigating evidence which, while perhaps not satisfying the relevant evidentiary standard, may nonetheless provide a basis for a sentence less than death. *Petition* at ¶19.

As the Court noted *supra*, the Constitution does not prohibit states from requiring capital defendants to prove mitigation evidence by preponderance of the evidence, so long as the State's burden of proving aggravating circumstances beyond reasonable doubt is not lessened. *Walton v. Arizona*, 497 U.S. 639, 649-651 (1990)(plurality); *see also Lockett v. Ohio*, 438 U.S. 586, 609 and n.16 (1978)(plurality)(leaving intact the requirement that the defendant prove the existence of mitigating factors by a preponderance of evidence). Further, although the Ohio Supreme Court has equated the defendant's "burden of going forward" with mitigating evidence with proving that mitigating evidence by a preponderance of the evidence, *see State v. Jenkins*, 15 Ohio St. 3d 164, 171-72 (1984); *see also State v. Stumpf*, 32 Ohio St. 3d 95, 101-102 (1987), that same statutory provision gives the defendant "great latitude" in doing so. *See* R.C. §2929.03(D)(1). In sum, it is not *per se* unconstitutional to place on the defendant the burden of proving existence of mitigating factors, and in Ohio, the State still bears the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

1.11 State Does Not Maintain Proper Data For Proportionality Review

In the eleventh sub-part of his first claim for relief, petitioner assails the constitutionality of Ohio's death penalty scheme on grounds that the scheme does not provide for sufficient excessiveness and disproportionality review. He asserts that Revised Code Sections 2929.021 and 2929.03, which require certain data to be reported by trial courts to appellate courts and the Ohio Supreme Court in all capital cases, critically do not require written life sentence recommendation reports. Petitioner also asserts that substantial doubts exist as to the accuracy of information reported by trial courts in capital cases after either guilty pleas to lesser offenses or after charge reductions at trial. In fact, petitioner argues, only minimal evidence is required in capital cases that result in sentences less than death. Petitioner asserts that these shortcomings prohibit adequate appellate review, which is an essential component to the constitutionality of a capital punishment scheme. *Petition* at ¶21.

Although the Supreme Court has held that States are not constitutionally required to provide appellate review of noncapital criminal cases, *Ross v. Moffitt,* 417 U.S. 600, 611 (1974), cases involving the death penalty are fundamentally different. *See Zant v. Stephens,* 462 U.S. 862, 884 (1983). Appellate review plays a crucial role in ensuring that the death penalty is not imposed arbitrarily or capriciously. For example, in *Gregg v. Georgia,* 428 U.S. 153, 211 (1976), the Court upheld Georgia's capital punishment scheme in large part because the statute required appellate review of every death sentence. *See also Proffitt v. Florida,* 428 U.S. at 253; *Jurek v. Texas,* 428 U.S. at 276. "[T]he Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by

statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg, supra,* 428 U.S. at 198. In *Pulley v. Harris,* 465 U.S. 37, 53 (1984), the Supreme Court reaffirmed the importance of appellate review to a capital punishment statutory scheme. There, the Court rejected the notion that proportionality review was required by the Eighth Amendment, *see also McQueen v. Scroggy,* 99 F.3d 1302, 1333-34 (6th Cir. 1996), but cautioned that *Gregg* "suggested that some form of meaningful appellate review is required." *Pulley,* 465 U.S. at 45.

Ohio's scheme of proportionality review by appellate courts is not unconstitutional. The Constitution does not require appellate courts to undertake this sort of comparison where the statutory scheme adequately channels the sentencer's discretion. *Pulley v. Harris,* 465 U.S. 37, 43-44 (1984). In *Pulley,* the Supreme Court explored the concept of "proportionality" review, noting that traditional proportionality review refers to an abstract evaluation of the appropriateness of a particular sentence for a particular crime, while another mode of proportionality review embodied in several state statutes presumes that the death sentence is not disproportionate to the crime, but purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because it is disproportionate to the punishments imposed in similar cases. *Id.* at 42-43. Faced with the question of whether the Eighth Amendment required a state appellate court, before affirming a death sentence, to compare the sentence to that imposed in similar cases if requested by the defendant to do so, the Supreme Court answered that question in the negative. *Id.* at 43-44. In so holding, the Court noted that, while its previous decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), regarded

favorably proportionality review by appellate courts as an additional safeguard against arbitrary and capricious sentencing, *Gregg*, 428 U.S. at 198, 204-206, 222-223, its decision in *Gregg* by no means required such review. *Pulley*, 465 U.S. at 44-46. In Ohio, appellate courts are required statutorily to compare a death sentence to other cases where they have affirmed death sentences. While perhaps not the most comprehensive system of comparison, this framework is neither irrational nor unconstitutional.

Further, the Court is satisfied that the appellate review mandated by Ohio's death penalty statute essentially mirrors the sort of appellate review approved by the Supreme Court in *Gregg*. Ohio's statute requires both the court of appeals and supreme court in cases involving offenses committed prior to January 1, 1995, and the supreme court in all other cases, not only to review whether the evidence supports the aggravating circumstances found by the sentencing court and whether the sentencing court properly weighed those aggravating circumstances and mitigating factors, but also to conduct their own independent review the evidence, as well as the offense and the offender, to determine whether the aggravating circumstances outweigh the mitigating factors in the case. R.C. §2929.05(A). The appellate courts are additionally required to determine whether the death sentence is appropriate by considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *Id.* Thus, petitioner has not demonstrated, and the Court is not otherwise persuaded, that the nature of appellate review accorded capital cases somehow renders Ohio's capital punishment scheme unconstitutional.

1.13 <u>No Means For Sentencer To Determine If Death Is "Appropriate" Sentence</u>

Petitioner argues in the thirteenth sub-part that Ohio's

death penalty statute is unconstitutional, in part, because, although the appellate courts are required to determine whether a given death sentence is "appropriate," there is no such requirement imposed upon the sentencer. Petitioner reasons that the sentencing body which recommends a death sentence -- either a jury or three-judge panel -- should be required to make a finding that the sentence of death is "appropriate," and to make that finding in such a fashion as to allow objective review by the appellate court and Ohio Supreme Court above. Otherwise, according to petitioner, arbitrary decisions are likely at the appellate level if courts are forced to make assumptions as to what the sentencer considered. *Petition* at ¶23.

Decisions issued by the United States Supreme Court appear to regard the "appropriateness" of a death sentence as the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990); *California v. Ramos*, 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, a defendant is death-eligible once the defendant has been charged with and found guilty of aggravated murder and at least one death penalty specification. Thereafter, "appropriateness" of the death penalty is determined when the sentencing body undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. The courts of appeals and Ohio Supreme Court are obligated, not only to review the trial court's assessment, but also to independently determine whether the sentence is proportionate, non-excessive, and appropriate based on the record of aggravating circumstances and mitigating factors. The Court is satisfied that Ohio's scheme identifies those death-eligible defendants who are actually deserving of the death sentence within the confines of the Eight Amendment, as set forth in *Gregg v. Georgia*,

supra.

Petitioner's argument about the "appropriateness" of a death sentence exults form over substance. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida,* 468 U.S. 447, 460 (1984). This Court has already concluded that Ohio's death penalty statute more than adequately balances the twin objectives set forth in *Gregg,* ensuring that the sentencer's discretion is suitably directed and limited, and that the sentencer undertake an individualized review of the defendant and the nature and circumstances of the case. That Ohio's statute, in directing the sentencer how rationally to select those death-eligible defendants whom should actually be sentenced to death, fails expressly to employ the word *appropriate,* does not, in this Court's view, mean that the sentencer is not doing just that, nor does it render the statutory framework unconstitutional. Thus, the argument raised in the thirteenth sub-part of petitioner's first claim for relief is not well taken.

1.15 Proportionality Review Is Flawed Because of Method of Case Comparison

In the fifteenth sub-part of his first claim for relief, petitioner argues that Ohio's capital punishment scheme is unconstitutional because of flawed proportionality review. Specifically, petitioner asserts that Ohio's statute does not require a sentencing jury or three-judge panel that recommends a sentence less than death to identify the mitigating circumstances, thereby preventing significant comparison of cases. Contributing to the flawed proportionality review, petitioner adds, are the accelerated review employed by the appellate courts and the requirement that only minimal information be included in sentencing

findings. Finally, petitioner complains that no meaningful comparison of cases can be accomplished when appellate courts are required to consider only those cases already decided by that court in which death was imposed. *Petition* at ¶¶26-28. Petitioner's assertions do not warrant habeas corpus relief.

With respect to petitioner's arguments concerning the quality of proportionality review in Ohio's appellate courts, petitioner's argument must be rejected, for, as the Court has already noted, proportionality review is not required by the Constitution. *Pulley v. Harris,* 465 U.S. 37, 43-44 (1984). The Supreme Court noted in *Pulley* that, while its previous decision in *Gregg v. Georgia,* 428 U. S. 153 (1976), regarded favorably proportionality review by appellate courts as an additional safeguard against arbitrary and capricious sentencing, *Gregg,* 428 U.S. at 198, 204-206, 222-223, its decision in *Gregg* by no means required such review. *Pulley,* 465 U.S. at 44-46. That being so, petitioner's complaints about Ohio's scheme of proportionality review are essentially foreclosed.

As for petitioner's remaining arguments, the Court has already noted the importance of appellate review to the functioning of Ohio's capital punishment scheme, and its satisfaction that the appellate review mandated by Ohio's death penalty statute essentially mirrors the sort of appellate review approved by the Supreme Court in *Gregg.* Ohio's statute requires both the court of appeals and supreme court in cases involving offenses committed prior to January 1, 1995, and the supreme court in all other cases, not only to review whether the evidence supports the aggravating circumstances found by the sentencing court and further whether the sentencing court properly weighed those aggravating circumstances and mitigating factors, but also to conduct their own independent review the evidence, as well as the offense and the offender, to determine whether the

aggravating circumstances outweigh the mitigating factors in the case. R.C. §2929.05(A). The appellate courts are additionally required to determine whether the death sentence in appropriate by considering whether the sentence is excessive or disproportionate to the penalty imposed in similar case. *Id.* Thus, petitioner's complaint that Ohio's appellate review is constitutionally infirm because it employs accelerated review, requires only minimal information to be included in the written findings at sentencing, uses what petitioner terms "an as yet undetermined method of comparison," and gathers incomplete and inadequate data, is not well taken.

It bears reminding that federal habeas courts reviewing the constitutionality of a state's capital punishment scheme are entrusted, not to opine or legislate what would be the most ideal capital punishment scheme, but only to ensure that the state's scheme and application thereof comports with constitutional safeguards, *i.e.*, that death sentences are not imposed arbitrarily or capriciously. Petitioner has not demonstrated, and the Court is not otherwise persuaded, that the review conducted by Ohio's appellate courts somehow renders Ohio's capital punishment scheme constitutionally infirm.

1.16 Appellate Courts' Reweighing Is Too Cursory

In the sixteenth sub-part of his first claim for relief, petitioner assails the quality of the statutorily-required "appropriateness" review undertaken by Ohio's appellate courts. Specifically, petitioner asserts that the Ohio Supreme Court and courts of appeals have failed to follow the dictates of R.C. §2929.05(A), requiring them to undertake a determination of the appropriateness of a death sentence by examining for themselves whether the aggravating circumstances outweigh the mitigating factors. According to petitioner, the appropriateness review ultimately conducted

in each case has become cursory and meaningless, and fails to genuinely distinguish between those individuals for whom death is an appropriate sentence and those for whom death is not an appropriate sentence. *Petition* at ¶¶29-30.

The Ohio appellate courts are required under R.C. §2929.05(A) to determine whether the sentence of death is appropriate. That section provides in relevant part:

> In determining whether the sentence of death is appropriate, the court of appeals ... and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *** The court of appeals ... or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

R.C. §2929.05(A). The appellate courts and Ohio Supreme Court, admittedly, have blurred somewhat the lines defining "appropriateness." Although R.C. §2929.05(A) clearly speaks of "appropriateness" as a proportionality review and one distinct from the inquiry into whether the aggravating circumstances outweigh the mitigating factors, most decisions issued by the appellate courts and Ohio Supreme Court speak of "appropriateness" far less clearly, often treating it as an inquiry separate from the proportionality review and as a summary conclusion following their independent inquiry into whether the sentence of death is excessive, disproportionate, or incorrect based on the record of aggravating circumstances and mitigating factors. *See State v. Sowell,* 39 Ohio St. 3d 322, 337 (1988)("we find that

the sentence of death in this action is not excessive or inappropriate, and we further find that this sentence is not disproportionate to those imposed in similar cases."); *State v. Post,* 32 Ohio St. 3d 380, 395 (1987)("the death sentence imposed in the case sub judice is appropriate and is neither excessive nor disproportionate."); *see also State v. Hutton,* 72 Ohio App. 3d 348, 351 (Ohio App. 8 Dist. 1991). This murkiness gives some credence to petitioner's argument.

That said, petitioner has not demonstrated, and the Court is not otherwise persuaded, that the "appropriateness" review employed by the appellate courts in Ohio ultimately is constitutionally infirm. Decisions issued by the United States Supreme Court appear to regard the "appropriateness" of a death sentence as the individualized sentencing determination that is undertaken after a jury or trial court has concluded that a defendant is eligible for the death penalty. *See Blystone v. Pennsylvania,* 494 U.S. 299, 305 (1990); *California v. Ramos,* 463 U.S. 992, 1007 (1983); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). Under Ohio's capital punishment scheme, appropriateness of the death penalty is determined when the sentencing body, having already found that a defendant convicted of aggravated murder is death-eligible because one or more aggravating circumstances has been proven beyond a reasonable doubt, undertakes a separate review of whether the aggravating circumstances outweigh any mitigating factors. The courts of appeals and Ohio Supreme Court are obligated, not only to review the trial court's assessment, but also to independently determine whether the sentence is proportionate, non-excessive, and appropriate based on the record of aggravating circumstances and mitigating factors. The Court is satisfied that Ohio's scheme identifies those death-eligible defendants who are actually deserving of the death sentence within the confines of the Eight Amendment, as set forth in *Gregg v. Georgia, supra.*

1.17 Death Penalty is Cruel and Unusual *Per Se*

1.18 Death Is Neither Least Restrictive Nor Most Effective Punishment

In the seventeenth sub-part of his first claim, petitioner argues that capital punishment amounts to cruel and unusual punishment *per se.* In the eighteenth sub-part, he argues that the State failed to establish in his case that death is least restrictive and most effective means to serve society's interests in deterrence, incapacitation, retribution. *Petition* at ¶¶32-37. The Court will address these arguments together.

In *Gregg v. Georgia,* 428 U.S. 153 (1976), the Supreme Court held that the punishment of death does not invariably violate the Constitution, in that it is neither excessive nor disproportionate. With respect to the excessiveness inquiry, the Court noted that "imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England," *id.* at 176-77, and that, "the existence of capital punishment was accepted by the Framers," *id.* -- and accordingly rejected the Eighth Amendment argument that the standards of decency had evolved to the point where capital punishment is no longer acceptable. "Despite the continuing debate, dating back to the 19th Century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." *Id* at 179. With respect to whether the punishment of death is disproportionate in relation to the crime of murder, the Court stated, "when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." *Id.* at 187. Thus, faced squarely with the question whether capital punishment violated the Eighth Amendment's prohibition against cruel and unusual

punishment, the Supreme Court concluded definitively that:

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 186-87. Specifically, the Supreme Court concluded that imposition of the death penalty for murder was neither excessive nor disproportionate, as those terms had come to be defined throughout the course of the Court's Eighth Amendment jurisprudence. *Id.* at 171-187.

In so holding, the Supreme Court considered the very arguments that petitioner now offers -- namely, that the death penalty violates the Eighth Amendment inasmuch as it is neither the least restrictive nor most effective means of furthering the societal interests of deterrence, incapacitation/ isolation, or retribution/moral reinforcement.[3] With respect to retribution, the Court insightfully noted:

---

[3] This Court is mindful of the fact that, in the years since *Gregg*, the argument that any of these interests -- deterrence, retribution, or incapacitation -- are effectively or narrowly furthered by capital punishment has been fodder for many dissenting opinions. *See Harris v. Alabama,* 513 U.S. 504, 517-520 (1995)(Stevens, J., dissenting); *Spaziano v. Florida,* 468 U.S. 447, 477-480 (1984)(Stevens, J., concurring in part and dissenting in part); *California v. Ramos,* 463 U.S. 992, 1023-1024 (1983)(Marshall, J., dissenting).

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Id. at 183. Observing that countless studies into the deterrent effect of capital punishment had produced a great deal of debate and inconclusive results, the Court resolved:

> We may nevertheless assume safely that there are some murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. *** The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Id. at 185-86. Finally, with respect to incapacitation of dangerous offenders, the Court simply acknowledged, without exploring, the fact that this is another oft-cited societal interest in support of capital punishment. *Id.* at 183 n.28.

After concluding that capital punishment did not invariably violate the Constitution, the Court proceeded to delineate the boundaries within which capital punishment schemes would have to operate to comport with the Eighth Amendment's prohibition against cruel and unusual

punishment. Specifically, the Court concluded that, to minimize the risk that death sentences would be imposed in an arbitrary and capricious manner, the sentencing body's discretion with respect to the grave determination of whether a human life should be taken or spared must be suitably directed and limited to minimize the risk of wholly arbitrary and capricious action. *Gregg*, 428 U.S. at 188-89.

> [I]n summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195. The statutory provisions governing the Ohio capital punishment scheme bear a striking resemblance, both as enacted and enforced at the time petitioner was indicted and convicted, to the scheme suggested by the Supreme Court in *Gregg*.

In sum, petitioner's claim that the statutory provisions governing Ohio's capital punishment scheme, and that capital punishment in general, violate the Eighth Amendment's prohibition against cruel and unusual punishment is belied by Supreme Court precedent. Ohio's scheme does not violate the Eighth Amendment insomuch as the Supreme Court has held that states can authorize capital punishment against an individual who intended to and did kill another or whose reckless indifference to human life resulted in the death of another. Ohio's scheme authorizes capital punishment only

when a defendant has been found guilty of aggravated murder, (defined as purposely causing the death of another), and at least one statutorily-designated aggravating specification. Petitioner's argument to the contrary is not well taken.

Second Claim for Relief

In his second claim for relief, petitioner argues that his guilty plea was not knowing, voluntary, and intelligent. As more fully described in the Court's November 9, 1999 Opinion and Order, petitioner and another individual, Clyde Daniel Wesley, participated in an armed robbery during which the victim in this case, Mary Jane Stout, was shot and killed. Petitioner has consistently maintained that Wesley fired the shots that killed Mrs. Stout. He has also admitted, however, to his participation in the robbery, and to shooting Mrs. Stout's husband, who survived the attack. Petitioner asserts that he derived no benefit from pleading guilty to the capital murder charge, that he never specifically affirmed his guilt during the plea colloquy, that he did not understand when he entered his guilty plea that he could still be sentenced to death, and that his counsel was ineffective for failing to advise him at that stage that he was not benefitting from the plea bargain and that he could still be sentenced to death. *Petition* at ¶¶38-47.

When a criminal defendant pleads guilty, he waives numerous fundamental constitutional rights -- including the right against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In light of the numerous fundamental constitutional guarantees that a defendant forfeits when he pleads guilty, the state has the burden to demonstrate that the plea is voluntary,

intelligent, and knowing. *Id*; *see also Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Generally, a plea is voluntary if it is not induced by threats or misrepresentations and if the defendant is advised of the direct consequences of the plea. *Brady v. United States*, 397 U.S. 742, 755 (1970). A plea is intelligent if the defendant understands the rights that he waives. *Boykin v. Alabama*, *supra*, 395 U.S. at 243.

A determination of the voluntariness and intelligence of a guilty plea must be made upon an analysis of the totality of the circumstances. *Garcia*, 991 F.2d at 327; *see also Berry v. Mintzes*, 726 F.2d 1142 (6th Cir.), *cert. denied*, 467 U.S. 1245 (1984). When a defendant later challenges the plea in federal habeas corpus on the ground that it was not voluntary, intelligent, and knowing, the state generally satisfies its burden by producing a transcript of the state court proceedings. *Garcia*, 991 F.2d at 326; *Dunn v. Simmons*, 877 F.2d 1275, 1277 (6th Cir. 1989), *overruled on other grounds by Parke v. Raley*, 506 U.S. 20 (1992). A state court's factual finding that the plea was proper generally enjoys a presumption of correctness in federal habeas corpus. *Garcia*, 991 F.2d at 326; *Dunn*, 877 F.2d at 1277. But when the transcript is inadequate to show that a plea was voluntary and intelligent, the presumption of correctness is called into question. *Garcia*, 991 F.2d at 326; *see also Jones v. Parke*, 734 F.2d 1142, 1148 (6th Cir. 1984).

> Where the [guilty plea] is subsequently challenged, the state normally will attempt to demonstrate its effectiveness by introducing a transcript of the proceedings surrounding the trial court's acceptance of the guilty plea, and other trial court records. Where the records leave doubt as to whether the plea was in fact intelligent and voluntary, the state may look to evidence extrinsic to the court records, such as the recollection of those attending the plea

> proceedings. However, in the face of a record which is inadequate to demonstrate the regularity of proceedings at the time of a guilty plea's acceptance, the state must make a clear and convincing showing with extrinsic evidence that the plea was in fact intelligently and voluntarily entered.

Dunn v. Simmons, *supra*, 877 F.2d at 1277 (*citing Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cr.), *cert. denied*, 423 U.S. 917 (1975)).

The record of state court proceedings surrounding the accepting of petitioner's guilty plea, although not a picture of clarity, is relatively straightforward. The furthest that the proceedings strayed from "regularity" actually came prior to petitioner's entering his guilty pleas. Jury selection began on August 20, 1984, after the trial court heard arguments on and eventually overruled defense counsel's motion to suppress statements. Jury selection abruptly ended on August 23, 1984, however, when petitioner apparently waived a jury trial. The proceedings resumed on September 17, 1984 before a three-judge panel, with Presiding Judge Henderson reading into the record the written jury waiver that petitioner had signed and filed on August 23, 1984.[4] (Tr., 09/17/84, at 4-5).

Immediately after reading that statement into the record, the trial court was advised by the prosecuting attorney that a plea agreement had been reached. The terms of that agreement, as they were set forth by the prosecuting attorney, are recounted here verbatim:

---

[4] It does not appear that any colloquy ensued between the trial court and petitioner regarding his waiver of a jury trial.

MR SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7(D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) in compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses -- the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of -- excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the

specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11(C)(3) to determine if there is a factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

(Transcript, 09/17/84, at 6-7). When asked by the trial court whether he "affirmatively acknowledged" the agreement as stated by the prosecuting attorney, petitioner answered, "Yes, sir." (Tr., 09/17/84, at 8). The trial court granted leave to amend the indictment as indicated above, and petitioner apparently initialed those changes. (*Id.* at 10).

The trial court then engaged petitioner and his attorneys in a colloquy to determine that his guilty pleas were voluntary, intelligent, and knowing. When asked whether they had fully investigated the facts and law, determined whether there existed any question as to the admissibility of statements and other evidence, and informed the petitioner of the elements of the offenses, as well as defenses and constitutional rights available to him, petitioner's counsel answered, "Yes, we have." (*Id.* at 11). Petitioner, after being sworn, then answered a series of questions posed by the trial court regarding the nature of the charges against him and the federal constitutional guarantees that he was forfeiting. Most important, for purposes of this discussion, was the following exchange:

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to being -- to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

(*Id.* at 14). Later, the trial court asked:

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the Court, this panel of Judges, will decide your sentence after considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record.

THE DEFENDANT: No, sir.

(*Id.* at 17-18). When the trial court then asked petitioner whether he was in fact guilty of the Aggravated Murder charge, defense counsel interrupted, at petitioner's behest, and explained that, although petitioner's answer would be "yes," it was petitioner's understanding that he would be given the opportunity to present evidence relevant to his conduct. (*Id.* at 18). Following that clarification, the trial court again asked petitioner whether he was "in fact guilty of the charge set forth in Count One, including specification one and specification four," to which petitioner responded, "Yes, sir." (*Id.* at 18-19).

After the plea colloquy, the trial court conducted an evidentiary hearing, as required under Ohio law with respect to guilty pleas in capital cases, to determine that there was a factual basis for petitioner's plea. The hearing, which began on September 18, 1984, concluded on September 20, 1984 with petitioner being found guilty of each offense to which he had pleaded guilty. Following the mitigation proceedings, the trial court reconvened on September 24, 1984 and sentenced petitioner to death on Count One.

Aside from the abrupt manner in which the trial proceedings shifted from jury selection to a three-judge panel facing a negotiated plea, the transcript of the proceedings surrounding petitioner's guilty plea suggests both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing. After the prosecuting attorney explained the plea agreement that had been reached, petitioner affirmatively acknowledged the agreement. (Tr., 09-17-84, at 6-8). Petitioner's attorneys affirmed on the record that they had investigated the facts and law relevant to the case, and had examined the admissibility of various statements and evidence. (*Id.* at 10-11). They further affirmed that they had informed petitioner of the elements of

the offenses with which he was charged, of all the defenses that were available to him, and of all his constitutional rights. (*Id.* at 11). Petitioner personally acknowledged that his attorneys had informed and advised him as such. (*Id.* at 13). Petitioner also affirmed that he understood that, for the offense of aggravated murder, he was eligible for, among other penalties, death by electrocution. (*Id.* at 14). Later, he acknowledged an understanding that, regardless of what promises or inducements may have been made to him, punishment would ultimately be determined by the trial court and that the Court could impose the maximum sentence. (*Id.* at 17-18). Finally, petitioner answered that he was in fact guilty of the offense of aggravated murder -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (*Id.* at 18-19). Petitioner averred that he was not under the influence of drugs or alcohol, and the transcript does not suggest otherwise. (*Id.* at 13-14). All of the foregoing indicates a plea that was voluntary, intelligent, and knowing.

With respect to petitioner's argument that he derived no benefit from pleading guilty to the aggravated murder offense, that might appear, in hindsight, to be true. But criminal defendants who make solemn admissions and declarations under oath will not be permitted to challenge the voluntariness of an otherwise valid plea -- made with a professed understanding of the nature of the charges, the rights waived, and the direct consequences including the maximum possible sentence -- simply because they ultimately did not obtain the results they had desired.

> A guilty plea invariably is made without complete foresight of the possible outcome of alternative procedures that might have been undertaken. Thus, an accused, with the assistance of his attorney, must examine the evidence which the Government has amassed against him, consider possible defenses, weigh the costs and benefits of proceeding to trial and ultimately decide, in light of the information then available, whether to enter a guilty plea. There is no guarantee that the accused will make the correct decision or that in hindsight such plea will not reflect an error in fact or judgment. Such uncertainty, which after all is the linchpin of every plea bargain, is inherent in a guilty plea and does not make the plea involuntary.

United States v. Turner, 881 F.2d 684, 686-87 (9th Cir.), *cert. denied*, 110 S.Ct. 199 (1989) (quoting *Johnson v. United States*, 539 F.2d 1241, 1243 (9th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977)). *See also McMann v. Richardson*, 397 U.S. 759, 769-771 (1970)("a guilty plea is not rendered involuntary merely because in hindsight the defendant wishes he had chosen a different course of action."); *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1972)("a defendant's mistaken subjective impressions gained from conferences with his legal counsel, in the absence of substantial objective proof showing that they were not reasonably justified, do not provide sufficient grounds upon which to set aside his guilty plea."), *cert. denied*, 410 U.S. 945 (1973).

As the Court noted above, petitioner affirmatively acknowledged his understanding of and agreement with the plea negotiations, as they were explained on the record by the prosecuting attorney. Ordinarily, "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). That said, the Court acknowledges that the prosecuting attorney's explanation of

the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that. Prophylactic colloquies designed to foreclose subsequent attacks are "neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (*per curiam*); *see also Machibroda v. United States*, 368 U.S. 487, 494-96 (1962); *Blackledge*, *supra*, 431 U.S. at 74-75; *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir.), *cert. denied*, 508 U.S. 943 (1993). However, the Court is faced with a transcript revealing a comprehensive colloquy between the trial court and petitioner, during which petitioner professed an understanding of the nature of the charges against him, the rights that he was waiving, and the direct consequences of his plea -- including the maximum possible sentence, that being death. In light of the foregoing, petitioner's argument that he derived no benefit from the plea bargain does not persuade the Court that his plea was not voluntary and intelligent.

Another argument advanced by petitioner in support of his challenge to the validity of his guilty plea is that he never actually affirmed that he was guilty of the aggravated murder offense. Petitioner's assertion is belied by the record. As the Court discussed above, petitioner answered, when asked by the trial court whether he was in fact guilty of the offense of aggravated murder, that he was -- albeit, only after a statement by defense counsel emphasizing that petitioner had requested counsel to explain to the trial court that petitioner would answer that he was guilty, with the understanding that he would have the opportunity to present evidence relevant to his conduct. (Transcript, 09/17/84, at 18-19). That petitioner's attorney qualified petitioner's position with respect to the question of whether he was in fact guilty of aggravated murder does not diminish or otherwise

undermine the answer that petitioner ultimately gave under oath -- namely, yes, that he was in fact guilty of aggravate murder. "[A] temporary qualification of position by the defendant is not sufficient to rebut the presumption of correctness of state court proceedings, and to support a finding that [the defendant] did not understand the nature of his plea." *Garcia v. Johnson*, *supra*, 991 F.2d at 327. Petitioner will not now be heard to assert that he never actually affirmed that he was guilty of aggravated murder.

Petitioner also argues, in support of his challenge to the validity of his guilty plea, that he did not understand that he would still be eligible for the death sentence. Again, petitioner's assertion is belied by the record. As the Court discussed above, when the trial court asked petitioner whether he understood that, by pleading guilty to the aggravated murder offense and specifications, he would be eligible for a life sentence with possibility of parole in twenty years, a life sentence with possibility of parole in thirty years, or death by electrocution -- petitioner answered, "yes, sir." (Transcript, 09/17/84, at 14). Later, petitioner acknowledged that he understood that, regardless of inducements or representations that may have been made to him, the trial court alone would decide his punishment and the trial court could impose the maximum sentence. (*Id.* at 17-18). Petitioner gave his answers on the record and under oath. His after-the-fact assertion that the answers he gave then were false, while the assertions he makes now are true, is an insufficient basis for determining that his plea was not knowing or voluntary.

Further, petitioner was represented by counsel, and, no doubt, discussed possible sentences with his attorney. "[I]t taxes credibility to suggest that the paramount question of sentence, from the point of view of the accused, would have remained unexplored in the attorney/client conferences." *Berry v. Mintzes*, 726 F.2d 1142, 1149 (6th Cir.), *cert.*

denied, 467 U.S. 1245 (1984). Defense counsel were well aware that petitioner was eligible for the death sentence. During the evidentiary hearing to determine that a factual basis existed for petitioner's guilty pleas, one of petitioner's attorneys noted in his opening statement that it was necessary to determine whether there was also a factual basis for the first specification to the aggravated murder count, "being the specification which does authorize the death penalty in this case." (Transcript, 09/17/84, at 35). It seems highly unlikely, in the absence of evidence to the contrary, that defense counsel did not apprise petitioner that he was eligible for the death penalty. Thus, above and beyond what is evident from the transcript of the plea colloquy -- namely, that petitioner stated under oath not once, but twice, that he understood that he was eligible for the death sentence -- the fact that petitioner was represented by counsel bolsters this Court's conclusion that possible sentences, including death, were discussed when considering whether petitioner should enter a guilty plea to the aggravated murder sentence.

Petitioner further argues that his plea was not voluntary and intelligent, due to the ineffectiveness of his attorneys in not informing him that he would derive no benefit and that he would still be eligible for the death penalty. As discussed above, the Court must proceed with caution in the face of after-the-fact assertions that what petitioner said under oath during the plea colloquy was false, while what he asserts now is true. During the plea colloquy, petitioner's attorneys affirmatively acknowledged that they had advised petitioner of the nature of the charges that he faced, of his possible defenses, and of the rights that he was waiving. Petitioner, who was present during that exchange between the trial court and defense counsel, confirmed that his attorneys had advised and informed him as such. The Court has before it a transcript that indicates a knowing, intelligent, and voluntary plea. The only evidence that petitioner has introduced to challenge the validity of his

pleas, as well as the apparent regularity of the state court proceedings, is his own affidavit, first submitted to the trial court as an exhibit to his postconviction action. Although the Court is neither free, nor inclined, to disregard that affidavit altogether, that affidavit, without more, does not permit the Court to dismiss the validity of answers and a plea of guilty given by petitioner on the record and under oath. *See Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir. 1993), *cert. denied*, 510 U.S. 1180 (1994); *Dempsey v. Wainwright*, 471 F.2d 604, 607 (5th Cir.), *cert. denied*, 411 U.S. 968 (1973); *see also Faught v. Cowan*, 507 F.2d 273, 275 (6th Cir. 1974), *cert. denied*, 421 U.S. 919 (1975).

It is evident from the record that defense counsel's strategy was to demonstrate during the evidentiary hearing, as well as the mitigation hearing, that petitioner did not fire the shots that killed the victim, and that the death penalty, accordingly, was either not authorized or not appropriate. This is amply demonstrated by the record, and petitioner has not sufficiently rebutted either the regularity of the plea proceedings, or that counsel's choices were borne from neglect and a dereliction of duty, as opposed to reasoned trial strategy.

For all of these reasons, the Court concludes that petitioner's second claim for relief is without merit.

Fourth Claim for Relief

In his fourth claim for relief, petitioner argues that his attorneys were constitutionally ineffective during the penalty phase of the case. There are seven sub-parts to this claim:

> 4.1 That counsel agreed to a mental examination which was not conducted in accordance with the provisions of Ohio law;

4.2 That counsel did not retain an independent psychological expert to assist during the penalty phase;

4.3 That counsel did not spend enough time preparing for the mitigation hearing;

4.4 That counsel did not select the most appropriate witnesses to testify and did not properly prepare other witnesses for their testimony;

4.5 That counsel failed to authenticate mitigation questionnaires which were distributed in Stumpf's home community, thus precluding the court from giving substantial weight to them;

4.6 That counsel did not prepare Stumpf adequately to give his unsworn statement, allowing him to focus on denying his involvement in the shooting of Mary Jane Stout rather than on factors relating to mitigation; and

4.7 That counsel did not object to the Court's receipt of the presentence investigation report, the victim impact statements, or the prosecutor's comments upon the unsworn nature of Stumpf's statement.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). With respect to the first prong of the *Strickland* test, the Court notes that, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish the second prong of the *Strickland* test, *i.e.,* prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Inherent in counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra,* 466 U.S. at 691; *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton,* 24 F.3d 823, 828

(6th Cir. 1994)(failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted); *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992) (reasonable investigation was lacking, so counsel's performance was deficient). The importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he can muster. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999).

> [C]ertainly, trial counsel must commit a serious error to be judged unconstitutionally ineffective. However, when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation.

Id. The Court will now consider each of petitioner's allegations of ineffectiveness.

4.1 Improper Mental Examination

In this sub-part, petitioner argues that his trial counsel were constitutionally ineffective for consenting to a procedure for a mental examination of petitioner that was not authorized by statute. Petitioner complains that, under this improper procedure, the state was permitted to require him to submit to a mental examination by a specialist of the prosecutor's choosing. He further complains that he was unable to utilize the examining psychologist or psychiatrist of his choice to prepare a coherent mitigation theory, because the agreed-upon procedure required that reports of the mental examination were to remain sealed and unavailable to the

attorneys until a determination of guilt or innocence was made. *Petition*, at ¶56(a). Petitioner raised this issue in postconviction, and both the trial court and court of appeals summarily determined that petitioner had received effective assistance of counsel during the trial and sentencing phases.

Petitioner refers to an order issued by the trial court in August, 1984, before petitioner waived his right to a jury trial and pleaded guilty. The order summarizes an agreement reached by petitioner, his counsel, and the prosecuting attorney regarding the procedure for conducting a mental examination of petitioner in the event that petitioner was convicted and a mitigation hearing would occur. (Exhibit LL to Return of Writ, Amended Petition To Vacate, at exhibit 11). Noting that petitioner had informed the trial court of his intention to request a mental examination in the event that he was convicted of aggravated murder and at least one death penalty specification, the order specified that all mental examinations and presentence investigations would be conducted in accordance with R.C. §2929.03(D)(1). The order further authorized petitioner to enlist, at the state's expense, a qualified psychiatrist or psychologist to examine him, while also requiring petitioner to submit to a mental examination by a psychiatrist or psychologist of the prosecutor's choosing. Finally, the order also provided that all reports would remain sealed, and that none of the individuals conducting the mental examinations would reveal their findings to either party or the court, unless and until requested by petitioner ***after*** a finding of guilt by the jury as to the aggravated murder count and at least one death penalty specification.

It appears from the record that, although the prosecution exercised its option to have petitioner evaluated by a psychologist, defense counsel did not. It further appears from the mitigation transcript and exhibits that neither the prosecution nor defense counsel presented testimony or any

evidence concerning a psychological evaluation of petitioner.

As noted above, to demonstrate constitutional ineffectiveness, petitioner must first show that his attorneys were so deficient as to fall below the standards of professional norms. Petitioner has not shown this, inasmuch as the agreed-upon procedure for mental examination about which petitioner complains, to the extent that it deviated from the procedure provided for by statute, was not inherently prejudicial and did not prejudice the petitioner in this case. Section 2929.03(D)(1) of the Ohio Revised Code provides that a capital defendant may request the trial court to order that a presentence investigation report and/or a mental examination be made in preparation for the mitigation hearing, that no such examinations will be made except at the defendant's request, and that copies of any such reports will be furnished to the jury, trial court, prosecuting attorneys, and the defendant.

Although this procedure is often criticized, Ohio courts have held that it is not unconstitutional, and have consistently rejected the argument that attorneys are constitutionally ineffective for utilizing it. *State v. McNeil,* 83 Ohio St.3d 438, 450-51 (1998); *State v. Keith,* 79 Ohio St.3d 514, (1997); *State v. Esparza,* 39 Ohio St.3d 8, 9 (1988); *State v. Buell,* 22 Ohio St.3d 124, 138 (1986). That is especially so when any negative information contained in the reports does not harm the defendant, either because that information was not inherently prejudicial or because it was established through the evidence already presented at trial, and when the report reveals useful evidence in mitigation. In sum, the decision to request a presentence investigation report or mental examination under R.C. §2929.03(D)(1), so long as there was some reasoned basis for it, is generally a tactical decision not to be second-guessed in hindsight.

To the extent that the procedure to which defense

counsel acquiesced deviated from the procedure provided for under R.C. §2929.03(D)(1), petitioner has not demonstrated, and it does not otherwise appear to the Court, either that the agreed-upon procedure was inherently prejudicial or that petitioner suffered any actual prejudice. Accordingly, it cannot be said that trial counsel fell below reasonable professional norms in consenting to the procedure or that petitioner was prejudiced by their actions. The procedure memorialized in the trial court's August 1984 order deviated from R.C. §2929.03(D)(1) in requiring petitioner to submit to two different evaluations, one by a psychologist of defense counsel's choosing and one by a psychologist of the prosecution's choosing. Under the statute, a defendant would submit to a single mental examination by a psychologist or psychiatrist of the court's choosing. It does not appear though, that this deviation was inherently prejudicial or that petitioner was actually prejudiced, insofar as it enabled defense counsel to have petitioner examined, at the state's expense, by a psychologist of their own choosing, a choice that is not normally available under the statute.[5]

The agreed-upon procedure also deviated from §2929.03(D)(1) in the fact that the reports were to remain sealed until after a determination on guilt or innocence had been made. Although that provision is curious, in light of the fact that it would obviously deprive counsel of potentially important information until a mitigation hearing was imminent, it does not appear that the provision was inherently prejudicial since there was nothing to prevent

---

[5] It appears from the record that defense counsel never actually went through with having petitioner evaluated by a psychologist. Further, it appears that, although the prosecution exercised its option to have petitioner evaluated by a psychologist, the prosecution presented no testimony or evidence at the mitigation hearing concerning that evaluation.

counsel from seeking a continuance, should they have found that necessary. Further, that deviation was of no consequence in the instant case, since it does not appear from the record that any mental examination reports were admitted or considered by the three-judge panel.

Thus, to the extent that the agreed-upon procedure for a mental examination of petitioner deviated from the procedure provided for by statute, the Court is not persuaded that counsel performed deficiently in agreeing to the procedure because nothing was demonstrably prejudicial about the agreed-upon procedure. In fact, the agreed-upon procedure provided some advantages that would not have been available to petitioner under the statutory procedure, *i.e.*, enlisting a mental specialist of defense counsel's choosing at the state's expense. Further, petitioner has not demonstrated that he was prejudiced by counsel's actions. In sum, this component of petitioner's trial counsel ineffectiveness claim is not well taken.

4.2 Failure to Obtain Psychologist for Mitigation

Petitioner argues in the second sub-part of his trial counsel ineffectiveness claim that his attorneys were constitutionally deficient for failing to obtain an independent psychologist to evaluate petitioner and assist with mitigation proceedings. Petitioner reasons that an independent psychologist could have assisted petitioner in presenting a coherent mitigation theory by explaining petitioner's behavior in the context of his psycho-social development. *Petition*, at ¶56(b, c).

As the Court noted in its discussion above, defense counsel apparently planned early on in the trial preparations, before petitioner waived his right to a jury trial and changed his plea to guilty pursuant to a plea agreement, to have petitioner evaluated by a psychologist or psychiatrist of their

choosing in the event that the trial proceeded to a mitigation phase. It appears from the record, however, that defense counsel never had petitioner evaluated, and, accordingly, that they presented no evidence at the mitigation hearing about petitioner's mental health. In an affidavit attached in support of petitioner's state court postconviction action, an attorney who had assisted petitioner with his postconviction action remarked that trial counsel had decided against a mental examination of petitioner based on their assessment that he did not suffer from a mental disease or defect. *See* Exhibit LL to the Return of Writ, Amended Petition To Vacate, at Exhibit F (Affidavit of Scott P. Kenney).

The statutory mitigating factors that are to be weighed against any aggravating circumstances of which a defendant was convicted are set forth in R.C. §2929.04(B). That section provides in relevant part --

> [T]he court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> (1) whether the victim of the offense induced or facilitated it;
>
> (2) whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (3) whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity

to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) the youth of the offender;

(5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.

R.C. §2929.04(B).

It appears from the mitigation transcript that trial counsel sought to establish four of the mitigating factors listed above -- namely, that petitioner was operating under duress or coercion at the hands of his co-defendant, Clyde Daniel Wesley; that petitioner was only 23 years old at the time of the offense; that petitioner lacked a significant criminal history; and that petitioner was not the principal offender. To that apparent end, trial counsel called the probation officer who had prepared petitioner's presentence investigation report, as well as the Guernsey County Clerk of Courts, to establish that petitioner lacked a significant criminal history. Although the probation officer later rebutted his own testimony during the state's case, revealing the existence of a few prior convictions that initially had been

overlooked, the trial court ultimately determined that petitioner lacked a significant criminal history. Trial counsel then called upon petitioner's family members, friends, teachers, and employers to testify about petitioner's childhood environment and background, general nature, social relationships, educational experience, and work history. Finally, petitioner gave an unsworn statement, the crux of which was that Clyde Daniel Wesley, and not petitioner, was the gunman who killed Mrs. Stout. Trial counsel submitted several exhibits that consisted of petitioner's social history, a summary of the mitigation investigator's survey of petitioner's hometown, as well as a myriad of questionnaires by family members and friends who did not testify at the mitigation hearing -- albeit, hastily prepared and submitted, by all accounts.

Petitioner has not demonstrated that counsel's decision not to present psychological evidence at the mitigation hearing fell outside the wide range of reasonable professional norms. Defense counsel decided not to have petitioner evaluated based on their assessment that he did not suffer from a mental disease or defect. *See* Exhibit LL to the Return of Writ, Amended Petition To Vacate, at Exhibit F (Affidavit of Scott P. Kenney). Put another way, that petitioner was not evaluated by a psychologist of defense counsel's choosing was the result -- not of neglect, oversight, or lack of investigation -- but of a tactical decision based on trial counsel's assessment that petitioner did not suffer from a mental disease or defect and that there was little to gain by having a psychologist testify at the mitigation hearing. It is reasonable for counsel to forgo a mental evaluation of their client if nothing suggested to them that a mental examination was warranted or if the client did not indicate that his attorneys should offer any mental health issues. *See Mills v. Singletary,* 161 F.3d 1273, 1286 (11th Cir. 1998), *cert. denied,* 528 U.S. 1082 (2000); *see also Thomas* v. *Gramley,* 951 F.Supp. 1338, 1344-45 (N.D. Illinois 1996)

(conversations with petitioner and family members gave counsel no reason to believe that petitioner suffered from mental or emotional disturbance), *aff'd Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998), *cert denied*, 525 U.S. 1123 (1999). It is also reasonable for counsel to forgo the pursuit and presentation of psychological evidence if undertaking to establish mental or emotional impairment would be inconsistent with the mitigation theory that defense counsel has charted. *See Mills v. Singletary*, 63 F.3d 999, 1024-25 (11th Cir. 1995), *r'hng and suggestion for r'hng en banc denied*, 70 F.3d 1288 (11th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996).

Petitioner argues, (and sought to establish through affidavits and exhibits in support of his postconviction action), that testimony by a psychologist demonstrating that petitioner suffered from alcohol and marijuana dependence, from dependent personality disorder and immature personality disorder, and from borderline verbal intellectual ability would have contributed to counsel's mitigation strategy of showing that petitioner possessed no intent to kill or harm anyone and was especially susceptible to the influence of Clyde Daniel Wesley. Although there may be some merit to petitioner's assertion, the most that it demonstrates is that counsel could have done more, which is almost always the case.

Dr. James R. Eisenberg evaluated[6] petitioner on September 9, 1988, and set forth his conclusions in an affidavit attached in support of petitioner's postconviction

---

[6] In addition to conducting a clinical interview, Dr. Eisenberg administered three psychological tests: (1) the Wechsler Adult Intelligence Scale -- Revised; (2) the Minnesota Multiphasic Personality Inventory; and (3) the Rorschach Inkblot Test.

action.[7] From the tests, Dr. Eisenberg concluded that petitioner had a full scale IQ of 80, placing him at the lowest end of the low average range; that petitioner had an adolescent profile, characterized by a need for immediate gratification and addictive qualities; and that petitioner was incapable of dealing with complex situations and was therefore prone to be a follower rather than a leader. Dr. Eisenberg diagnosed petitioner as having the following disorders: alcohol dependence, cannabis dependence, personality disorders not otherwise specified (dependent personality disorder and immature personality disorder), and borderline verbal intellectual ability. Based on all of the above, Dr. Eisenberg was of the opinion that petitioner was quite dependent on others and was especially vulnerable to the influence of others. Dr. Eisenberg was further of the opinion that all four disorders noted above, as well as petitioner's troubling childhood environment, marked by alcoholism and sexual abuse, could have been considered as relevant mitigating factors under R.C: §2929.04(B)(7).

The Ohio Supreme Court has recognized the mitigation value of the sort of testimony that Dr. Eisenberg could have provided. Although Dr. Eisenberg's diagnoses would not have qualified as a mental disease or defect that prevented petitioner from appreciating the criminality of his conduct or from conforming his conduct to the requirements of the law, *see* R.C. §2929.04(B)(3) -- the reason, apparently, that trial counsel chose not to present psychological evidence at the mitigation hearing -- Dr. Eisenberg's testimony may very well have established mitigating factors set forth in R.C. §§ 2929.04(B)(2) and (B)(7). With respect to the duress/coercion factor set forth in §2929.04(B)(2), the Ohio Supreme Court noted in *State v. Carter*, 72 Ohio St. 3d 545 (1995), that strong domination by another over the defendant,

---

[7] *See* Exhibit LL to the Return of Writ, Amended Petition to Vacate, at exhibit B.

so as to cause the defendant to act other than he ordinarily would, is mitigating in nature. In so holding, the court noted that the defendant's low intelligence and his susceptibility to the influence of others would be relevant to determining the existence of coercion. *See also State v. Woods*, 48 Ohio St. 2d 127 (1976), *vacated on other grounds*, 438 U.S. 910 (1978). The Ohio Supreme Court has also demonstrated a willingness to attach some degree of weight to evidence of psychological problems that do not rise to the level of "mental disease or defect" under R.C. §2929.04(B)(3). *State v. Spivey*, 81 Ohio St. 3d 405 (1998); *State v. Awkal*, 76 Ohio St. 3d 324 (1996).

With respect to the first prong of the *Strickland* test, it certainly could be said that trial counsel could have been more thorough in their preparation and more ordered in their presentation with respect to the mitigation hearing. The constitutional inquiry, however, is not whether counsel could have done better, or whether petitioner could have benefitted from the best possible defense; but rather, whether counsel made errors or omissions so serious that counsel were not functioning as the advocates guaranteed by the Sixth Amendment. *See Laws v. Armontrout*, 863 F.2d 1372, 1384 (8th Cir. 1988)("[C]ounsel could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984))), *cert. denied*, 490 U.S. 1040 (1989). As for the prejudice prong of *Strickland*, it would be easy enough to speculate that the substance of Dr. Eisenberg's testimony could have mitigated petitioner's culpability by showing that petitioner acted under duress or coercion at the hands of Clyde Daniel Wesley. But the *Strickland* Court took great pains to caution against speculation borne of hindsight, warning that, "[a] fair assessment of attorney performance requires that every effort

be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra*, 466 U.S. at 689. In the instant case, the record demonstrates that defense counsel made a reasonable decision not to present testimony by a psychologist based on their assessment that petitioner did not suffer from a mental disease or defect and that petitioner would not benefit from evidence that he was dependent on drugs and alcohol, was of low intelligence, and was too easily influenced by others. Counsel's decisions and strategic course cannot be criticized in hindsight if there was some reasonable basis for those decisions.

4.3 Failure To Spend More Time Preparing For Mitigation

In this sub-part, petitioner argues that his trial attorneys were constitutionally ineffective for failing to begin preparation for the mitigation phase until it was too late adequately to investigate petitioner's background, provide a social history to a psychologist, and develop a mitigation theory. Petitioner complains that, according to the docket, defense counsel did not request the services of a social worker/mitigation specialist until August 30, 1984, and that mitigation preparation did not begin until September 6, 1984. *Petition*, at ¶56(d). Petitioner asserts that trial counsel were also ineffective for not requesting a continuance following his guilty plea to allow adequate time to prepare for the mitigation phase. *Petition*, at ¶56(e). Petitioner entered his guilty pleas on September 17, 1984; following a hearing to ensure that there was a factual basis for petitioner's guilty pleas, the mitigation phase began on September 20, 1984.

As the Court noted earlier, chief among counsel's responsibilities is the duty to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." *Strickland, supra,* 466 U.S. at 691; *Sims v. Livesay,* 970 F.2d 1575, 1580-81 (6th Cir. 1992); *see also O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 1994); *Workman v. Tate,* 957 F.2d 1339, 1345-46 (6th Cir. 1992). The importance of competent representation during the penalty phase of a capital trial cannot be understated, especially with respect to the duty to investigate, since, as a practical matter, all that stands between a defendant who has been convicted of a capital specification and death is whatever mitigation evidence he can muster. *Mapes v. Coyle,* 171 F.3d 408, 426 (6th Cir. 1999).

Petitioner's attorneys filed an application on August 30, 1984, prior to petitioner's waiving his right to a jury trial and entering his guilty pleas, to engage the services of a social worker to assist in preparation for the mitigation phase, should a mitigation phase be necessary. According to affidavits attached to petitioner's amended postconviction action,[8] a social worker, Debbie Starkey, and a social work intern, Charlotte Gilbert, met with one of petitioner's trial attorneys, Mr. Tingle, on September 6, 1984. Ms. Starkey went on to state that, after initially contemplating the gathering of petitioner's background information to present to a psychologist prior to a psychological evaluation of petitioner, one of petitioner's trial attorneys, on September 10, 1984, directed Starkey and Gilbert to focus on gathering information from the Cannonsburg, Pennsylvania community where petitioner lived.

Ms. Gilbert interviewed petitioner for the first time on that same day, and then departed for Cannonsburg. Between September 11th and September 13th, Ms. Gilbert distributed and gathered questionnaires that she and Ms. Starkey had

---

[8] *See* Exhibit LL to the Return of Writ, Amended Petition to Vacate, at exhibits D and E.

prepared among family members, friends, and various acquaintances. During that time, Ms. Starkey also collected petitioner's school and hospital records. From September 14th through September 18th, Ms. Starkey and Ms. Gilbert sifted through the questionnaires and records, and prepared a social history for petitioner, as well as a summary of the information they had gathered from Canonsburg. During that period of four days, they also finalized a witness list for the mitigation hearing with Mr. Tingle.

On September 19th, Ms. Starkey and Ms. Gilbert met with Mr. Tingle and, for the first time, petitioner's other defense attorney, Mr. Stephens. According to Ms. Starkey, petitioner's attorneys wanted all references to drugs and alcohol deleted from the social history summary that had been prepared, until counsel realized that the presentence investigation report contained similar references anyway. Ms. Starkey and Ms. Gilbert assert that they urged petitioner's attorneys to have petitioner evaluated by psychologist, because Ms. Starkey and Ms. Gilbert were of the opinion that petitioner was of borderline intelligence and that this was an important fact.

On September 20, 1984, the day that the mitigation hearing began, Ms. Starkey, Ms. Gilbert, Mr. Tingle, and Mr. Stephens met with petitioner's witnesses, with Ms. Starkey and Ms. Gilbert asking each of them five or six questions. On that same day, Mr. Tingle and Mr. Stephens undertook to prepare petitioner to give his unsworn statement at the mitigation hearing; according to Mr. Starkey, that preparation consisted of Mr. Stephens "ranting and raving" at petitioner and of focusing petitioner's statement to point to Clyde Daniel Wesley as the principal offender. Both Ms. Starkey and Ms. Gilbert stated in their affidavits that they did not feel that they had had enough time to prepare for petitioner's mitigation hearing.

Petitioner has not demonstrated either that his attorneys were constitutionally deficient with respect to the amount of time that they devoted to preparing for his mitigation hearing, or that he suffered any prejudice as a result of their actions. There is no hard and fast rule about when mitigation preparation should begin; that will vary based on the nature of the case, counsel's experience, and the mitigation theory to be presented. Petitioner asserts that trial counsel began preparing for the mitigation phase too late adequately to investigate his background or to present his social history to a psychologist. But even a cursory review of the mitigation transcript and petitioner's postconviction exhibits reveals that there was no shortage of testimony or physical evidence describing petitioner's background and social history. Moreover, there was no need to prepare background information or a social history for a psychologist, since trial counsel elected against having petitioner evaluated and against attempting to show that petitioner suffered from a mental disease or defect.

Finally, with respect to petitioner's argument that trial counsel did not have enough time to develop a mitigation theory, the record amply demonstrates that trial counsel sought primarily to establish that Clyde Daniel Wesley, and not petitioner, was the principal offender, and in addition, to demonstrate that petitioner's culpability could be mitigated by the fact that he was only 23 years old at the time of the offense, the fact that he lacked a significant criminal history, and the fact that his actions that day were the result of duress and coercion at the hands of Clyde Daniel Wesley. In other words, trial counsel advanced a mitigation theory which, while perhaps not as forceful or articulate as it could have been, was nonetheless discernable. Thus, petitioner has not shown either that his trial attorneys were constitutionally deficient in the amount of time that they devoted to preparing for the mitigation phase.

4.4 Selection And Preparation Of Mitigation Witnesses

Petitioner asserts in this sub-part that this trial attorneys were constitutionally ineffective for not selecting the best witnesses to testify at the mitigation hearing, and for not better preparing the witnesses who did testify. *Petition,* at ¶¶56(f, g). Petitioner reasons that the failure to present the best witnesses, along with the failure to prepare better the witnesses who did testify, resulted in an inaccurate, incomplete depiction of his background, and also prevented the introduction of relevant mitigation evidence. Specifically, petitioner argues that counsels' deficient performance prevented the thee-judge panel from learning about petitioner's family dysfunction, including history of alcoholism and sexual abuse; parental dysfunction and chaos; alcohol and marijuana dependency; personality disorders not otherwise specified (dependent and immature personality); impact of borderline intellectual and verbal ability; impact of the history of petitioner's interaction and relationship with Clyde Daniel Wesley; petitioner's ability to peacefully adjust to incarceration; and his environmental influences. Petitioner's arguments are not well taken.

It bears repeating that attorneys enjoy a strong presumption of competence, and that an attorney's strategic choices, so long as they are based on reasonable investigation and judgment, are entitled to a great deal of deference. *Strickland, supra,* 466 U.S. at 691. The Court of Appeals for the Eighth Circuit cogently described this rule in the context of mitigation proceedings:

> [I]n order to determine what evidence might be appropriate, defense counsel has the duty to conduct a reasonable investigation. The failure to conduct any investigation of a defendant's background may fall outside the scope of

reasonable professional assistance. After a sufficient investigation, however, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation. A lawyer's election not to present mitigation evidence is a tactical choice accorded a strong presumption of correctness which is virtually unchallengeable.

* * *

[T]hus, a determination must be made whether the failure to put this [mitigating] evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. The only question then remaining would be whether [petitioner]'s attorney had a reasonable basis for his strategic decision that an explication of the defendant's family background would not have reduced the risk of the death penalty.

Bolender v. Singletary, 16 F.3d 1547, 1557-59 (11th Cir.), *cert. denied*, 513 U.S. 1022 (1994), *r'hng denied*, 513 U.S. 1136 (1995).

This is not a case where trial counsel failed altogether to investigate or present evidence in mitigation; rather, this is a case where petitioner challenges the witnesses that counsel called, and the extent of his background that counsel presented and explored with the witnesses who did testify. It is easy enough, after the fact, to criticize a strategy that did not succeed. But that sort of second-guessing and finger-pointing smacks of the very hindsight that *Strickland* cautioned against. In the weeks leading up to the mitigation

hearing, petitioner's attorneys, through the assistance of two social workers, collected a fair amount of information about petitioner's background through interviews, questionnaires, and records collected from petitioner's hometown, as well as summaries prepared by the social workers and the presentence investigation report compiled by the Guernsey County Probation Department. Strapped with the reality that most of the relevant character witnesses lived outside the state, counsel nonetheless called numerous family members, friends, former employers, and teachers to testify at petitioner's mitigation hearing, and introduced additional questionnaires, summaries, and records detailing petitioner's background and social relationships.

Petitioner will not be heard to complain that counsel called the wrong witnesses, and failed to prepare the witnesses who did testify; counsels' mitigation strategy reflects professional judgment based on reasonable investigation. Moreover, petitioner has not demonstrated that different or better-prepared witnesses, or that a greater push to emphasize his traumatic background, would have lessened his risk of receiving the death penalty.

4.5 Failure To Authenticate Questionnaires Submitted At Mitigation Hearing

In this sub-part, petitioner argues that his attorneys were constitutionally ineffective in failing to properly authenticate numerous questionnaires that were submitted in the mitigation proceedings on behalf of people from petitioner's hometown who did not testify during the mitigation proceedings. *Petition*, at ¶56(k). According to petitioner, this resulted in the trial court giving very little if any weight to the questionnaires or to the survey prepared by the social workers.

Following petitioner's unsworn statement at his

mitigation hearing, his attorneys offered into evidence, among other documents, three exhibits consisting of approximately sixty questionnaires completed by members of petitioner's hometown community in response to canvassing by social workers on behalf of petitioner, a summary of the results of that survey prepared by the social workers, and petitioner's social history compiled by the social workers. (Mitigation transcript, 09/20/84, at 505-506). The prosecution objected on grounds that they had not received copies in advance, that the documents were not properly identified or authenticated, and that they amounted to improper hearsay. *Id.* at 506. After noting concerns over the irregularity of the documents, the trial court ultimately erred on the side of allowing the defendant every opportunity to present matters in mitigation and reluctantly admitted the documents -- albeit, with one of the three judges dissenting. *Id* at 507-509.

It is apparent from the transcript and the trial court's sentencing opinion that what little weight the trial court ultimately accorded the documents was due as much to the unpersuasive nature of those documents as to the fact that they were not properly identified or authenticated. Although the documents were admittedly of questionable value, the Court is not persuaded either that their introduction harmed petitioner or that calling each of the people who completed questionnaires would have benefitted petitioner. Thus, the Court does not agree with petitioner's argument that his trial attorneys were constitutionally ineffective for failing to properly authenticate those questionnaires or that petitioner was prejudiced by counsels' actions. Further, with respect to the decision even to rely on those questionnaires and summaries, trial counsel made a tactical decision that the information contained in those documents might have been of some value to petitioner but that calling each of those witnesses would have resulted in the presentation of cumulative evidence which would have provided no benefit

to petitioner, *id.* at 505, and that decision is entitled to deference. For these reasons, the Court concludes that this allegation of trial counsel ineffectiveness is without merit.

4.6 Failure To Prepare Petitioner Adequately To Give Unsworn Statement

Petitioner argues in this sub-part of his fourth claim for relief that his trial attorneys were constitutionally ineffective for failing to prepare him adequately to give his unsworn statement. Petitioner asserts that counsel steered him into focusing entirely on the shooting of Mary Jane Stout, and specifically, on fingering Clyde Daniel Wesley as the triggerman, at the expense of comments relating to any other mitigating factors. *Petition*, at ¶56(g).

Following the testimony of the many witnesses that trial counsel had called to testify about petitioner's childhood, family and social relationships, educational record, and work history, petitioner gave an unsworn statement on his behalf. According to affidavits attached to petitioner's amended postconviction action, trial counsel had spent that morning preparing petitioner to give his statement, designing the statement to stress that Clyde Daniel Wesley shot and killed Mrs. Stout, *i.e.*, that Wesley, not petitioner, was the principal offender. (Exhibit LL to Return of Writ, Amended Petition to Vacate, at exhibits D and E). In his statement, petitioner explained the events that unfolded, highlighting that Wesley had shot at a passing driver while they were driving west on interstate 70, that it was Wesley who wanted to stop at the Stout's home, that it was Wesley who feigned making a telephone call, that it was Wesley who took charge of burglarizing the house and who instructed petitioner to hold the Stouts at gunpoint, and that, although petitioner shot Norman Stout, it was Wesley who picked up the same gun and fatally shot Mrs. Stout. (Mitigation transcript, 09/20/84, at 500-503). Petitioner described himself

as scared, uncertain, and shaky, while painting Wesley as aggressive and assured. *Id.* Petitioner concluded his remarks by expressing remorse for the events and for his role in them. *Id* at 503.

The Court is not persuaded that petitioner's attorneys were constitutionally ineffective in preparing him to make his unsworn statement. First, it is evident from the record that counsels' strategy for petitioner's unsworn statement was to establish Clyde Daniel Wesley as the principal offender in the murder. That theme, as planned and delivered, was not only consistent with, but essential to, counsels' mitigation theory that petitioner was not the gunman who killed Mrs. Stout and that petitioner's role in the events that unfolded at the Stout home was as a scared follower, not a ruthless culprit. The social workers' affidavits attached to petitioner's state postconviction action demonstrate that the attorneys, if nothing else, were tenacious and firm in their preparation of petitioner, and were convinced that the trial court's decision whether to impose life or death hinged on whether petitioner could demonstrate that he was not the principal offender. The record before the Court reveals no glaring omission or neglect on counsels' part. Finally, petitioner has not demonstrated, and it is not otherwise evident to the Court, what more could have been accomplished by petitioner's unsworn statement, had counsel spent more time or selected a different approach.

Mindful that the inquiry is not what more counsel could have done or how petitioner may have benefitted from a different approach, but only what was constitutionally compelled, the Court concludes that petitioner's attorneys did enough. In other words, the Court is not persuaded that petitioner's attorneys were constitutionally ineffective in preparing petitioner to make his unsworn statement, or that petitioner was prejudiced by their actions.

4.7 Failure To Object To Presentence Report, Victim Impact, Prosecutor's Comments

In the final sub-part of this claim, petitioner asserts that his trial attorneys were constitutionally ineffective for failing to object to the presentence investigation report -- which contained a victim impact statement, otherwise inadmissible "other acts" evidence, and a recitation of facts not in evidence. *Petition,* at ¶57. Petitioner also challenges his attorneys' failure to object to a separately filed victim impact statement, or to the prosecutor's comments upon the unsworn nature of petitioner's statement. *Petition*, at ¶ 58-59.

With respect to petitioner's contention that his attorneys were ineffective for requesting, and then not objecting to the admission of, a presentence investigation report, the Court concludes that his argument is without merit. As noted earlier, R.C. §2929.03(D)(1) requires that a presentence investigation report be prepared for the mitigation phase, but only upon the request of the defendant. That section further states that, should the defendant request the report, copies of the presentence investigation report must be provided to the defendant, prosecutor, trial judge, and the jury, if the case was tried before a jury. Recent Ohio Supreme Court law dictates that it is not constitutionally ineffective for an attorney to utilize §2929.03(D)(1) to request a presentence investigation report. *State v. McNeil,* 83 Ohio St. 3d 438, 451 (1998); *State v. Hutton,* 53 Ohio St. 3d 36, 42-43 (1990). In fact, the Court is aware of one state judge who questioned the effectiveness of an attorney who did ***not*** avail himself of the often valuable procedures set forth in R.C. §2929.03(D)(1). *State v. Johnson,* 1984 WL 6368 (Ohio App. 8 Dist. Dec. 13, 1984)(Russo, J., dissenting), at *22 n.1. The Court further finds, after reviewing the record, that the information contained in the presentence investigation report was essentially cumulative to the information that defense counsel discovered in their

own investigation and subsequently presented during the mitigation hearing.

As for petitioner's argument that his attorneys were ineffective for failing to object to the separately filed victim impact statement, the Court concludes for several reasons that this argument is without merit. In *Payne v. Tennessee*, 501 U.S. 808, 826 (1991), the United States Supreme Court held that the Eighth Amendment erects no *per se* bar if a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject. "'A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* In so holding, the Court expressly rejected the defendant's *stare decisis* arguments and overruled two previous decisions which had prohibited, on Eighth Amendment grounds, the admission of victim impact evidence and prosecutorial arguments on that subject in the capital sentence process. *Id.* at 824-25, *overruling, Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

The *Booth* and *Gathers* decisions presumably provide the basis for petitioner's argument that his attorneys were ineffective for not challenging the admission of the victim impact evidence. Petitioner's conviction became final when the United States Supreme Court denied his petition for a writ of *certiorari* on February 22, 1988. *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)(holding that, if federal question is involved, process of direct review includes the right to petition the United States Supreme Court for writ of *certiorari*). *Booth* was decided in 1987; *Gathers* was decided two years later in 1989. Thus, *Booth's* Eighth Amendment prohibition against the admission of victim impact evidence was in effect before petitioner's conviction became final; concomitantly, petitioner's conviction was final before *Payne*

was decided, which decision lifted the Eighth Amendment bar against victim impact evidence. Thus, at the time when petitioner's conviction became final, it was unconstitutional to use victim impact statements in the penalty phase of a capital murder case. This fact does not entitle petitioner to relief, however, because even assuming that admission of the victim impact evidence was improper under *Booth and Gathers, Payne* is applicable -- not *Booth* and *Gathers.*

Those circuits which have squarely addressed this issue have agreed that *Payne* precludes the finding of a constitutional violation based solely on the admission of victim impact evidence, ***even if*** the state court conviction was final before *Payne* was decided. *See Wiley v. Puckett*, 969 F.2d 86, 105 (5th Cir. 1992); *Pierson v. O'Leary*, 959 F.2d 1385, 1390-91 (7th Cir.), *cert. denied*, 113 S.Ct. 168 (1992); *Horton v. Zant*, 941 F.2d 1449, 1466 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992). In *Teague v. Lane*, 489 U.S. 288, 310 (1989), the Supreme Court held that a new rule of constitutional law established after a petitioner's state conviction has become final may not be used to attack the state conviction in habeas corpus unless the new constitutional principle falls within two narrow exceptions. Although it may not seem so at first glance, the retroactive application of *Payne*, upon closer examination, is entirely consistent with *Teague v. Lane, supra. Teague's* nonretroactivity rule is rooted exclusively in the interest of preserving the finality of state criminal convictions. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). A habeas corpus petitioner, however, has no corresponding interest in the finality of the state court judgment against him, as evidenced by the fact that the very purpose of his habeas petition is to upset that judgment. *Id.* In other words, unlike the States, habeas corpus petitioners are not entitled any benefit under *Teague*. Rather, *Teague* limits the authority a petitioner may use to attack his conviction; it does not extend any benefit whatsoever to habeas corpus applicants.

Thus, the issue whether the victim impact evidence introduced during petitioner's capital sentencing proceeding is governed by *Payne*.[9] Under *Payne*, the *per se* Eighth Amendment bar against the admission of victim impact evidence is lifted, and the inquiry is limited to whether the victim impact evidence was so unduly prejudicial as to render petitioner's trial fundamentally unfair. *Payne*, 501 U.S. at 825. The victim impact evidence presented in petitioner's case did not rise to that level, consisting essentially of a description in the presentence investigation report of Mr. Stout's colorless recollections of the events up until the point when he was shot, and a separately filed victim impact statement consisting of a physician's detached explanation of the nature and lingering effects of the wounds that Mr. Stout had suffered and of the fatal and non-fatal wounds that Mrs. Stout received.

As to the testimony presented during the guilt and sentencing phases that even remotely touched upon victim impact evidence, that testimony cannot credibly be characterized as especially moving or colorful, to the extent that this Court can assess as much from a cold transcript. With the exception of isolated references to the fact that Mrs. Stout was 54 years old, and possibly suffering from a bout of the flu at the time of the incident, the prosecutor made no real remarks akin to victim impact evidence in his mitigation phase closing statement. Under the *Payne* standard, therefore, the Court is not persuaded that the victim impact evidence of

---

[9] Moreover, the Court of Appeals for the Fourth Circuit has held that, even assuming *Booth* would extend retroactively to benefit a defendant sentenced before *Booth* was decided, the fact remains that *Payne*, which permits the admission of victim impact evidence, would apply to any re-sentencing of the defendant. *Washington v. Murray*, 952 F.2d 1472, 1480-81 (4th Cir. 1991).

which petitioner complains was unduly prejudicial. For this reason, the Court cannot find that petitioner's attorneys were constitutionally ineffective in not objecting to that evidence, even assuming the trial court would have sustained the objection.

Beyond the applicability of *Payne* in barring relief for petitioner on his victim impact evidence claim, the Court further finds that there is no indication whatsoever that the trial court gave weight to the victim impact evidence in determining that the aggravating circumstances outweighed the mitigating factors. In *Cooey v. Anderson*, 988 F.Supp. 1066 (N.D. Ohio 1997), the petitioner sought habeas corpus relief on, among other grounds, the admission of victim impact statements during the penalty phase of his trial. After assuming, without discussing, that *Payne* was applicable to petitioner's case, which had become final on direct review before *Payne* was decided, the district court concluded that petitioner was not entitled to relief on his victim impact evidence claim because he could not demonstrate, and the record did not otherwise suggest, that the victim impact statements were considered by the trial court when it imposed the death sentences.[10] *Cooey*, 988 F.Supp. at 1090-1091.

Under that standard, the Court cannot find that petitioner's attorneys were constitutionally deficient for not objecting to the admission of victim impact statements during the penalty phase. First, it bears mentioning that, under R.C. §2929.12(B)(2), the trial court is required to consider physical, psychological, and economic impact on the victim(s) in non-capital felony criminal sentencing. In light of the fact that petitioner was also sentenced for the

---

[10] The petitioner was also convicted of and sentenced on non-capital felonies. *Cooey*, 988 F.Supp. at 1089-1091.

attempted murder of Norman Stout, it would have been disingenuous for counsel to have objected to the admission of any victim impact statement from Norman Stout.

The Court further finds in the instant case no indication whatsoever that the trial court relied on or even considered the fleeting victim impact statements that were admitted as part of the presentence investigation report and as a separate piece of evidence, in sentencing petitioner to death on the aggravated murder charge. The Court has reviewed the announcement made by the trial court at the conclusion of the penalty phase, as well as the trial court's written opinion, and finds no mention of the victim impact statements. Just prior to imposing a sentence of death for the murder of Mary Jane Stout, the trial court announced its finding beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, and stated that it considered, in addition to that finding, the argument presented by counsel, the petitioner's statement, and the presentence investigation.[11] In other words, the Court is not persuaded that the trial court relied on the victim impact statements in imposing the death sentence. Thus, the Court is not persuaded that petitioner was prejudiced by their admission into evidence.

Finally, with respect to petitioner's argument that his attorneys were constitutionally ineffective for not objecting to comments by the prosecutor during his penalty phase closing argument regarding the unsworn nature of petitioner's statement, the Court concludes that this claim is without merit. Although these comments are certainly questionable at best, recent Ohio Supreme Court law

---

[11] The Court is mindful, however, that there appears to be a page missing in the transcript from the trial court's pronouncement of sentence; that portion of the sentencing transcript skips from page 546 to 548.

confirms that an attorney may reasonably elect not to interrupt opposing counsel's closing remarks. *See State v. Keene,* 81 Ohio St. 3d 646, 668 (1998).

More significant to the Court, however, is that petitioner's case was tried to a three-judge panel instead of a jury. It is reasonable to presume that a trial panel, as opposed to a jury, will be scrupulous enough to avoid admitting or considering improper evidence in its sentencing decision. *See State* v. *Lott,* 51 Ohio St. 3d 160, 176 (1990); *see also State v. Post,* 32 Ohio St 3d 380, 383-84 (1987)(holding that error in admitting victim impact statement did not warrant reversal because the case was tried before a three-judge panel rather than a jury). Such has been the state of the law in Ohio since 1968. In *State v. White,* 15 Ohio St. 2d 146, 151 (1968), the Ohio Supreme Court noted that it would indulge "in the usual presumption that in a bench trial in a criminal case the [trial] court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." Federal circuits considering this question indulge the same presumption. *United States v. Busch,* 758 F.2d 1394, 1398 (10th Cir. 1985); *United States v. Impson,* 562 F.2d 970, 971 (5th Cir. 1977), *cert. denied,* 434 U.S. 1050 (1978); *United States ex rel. Placek v. Illinois,* 546 F.2d 1298, 1304-1305 (7th Cir. 1976). This reasoning is applicable to all three of petitioner's challenges -- namely, that his attorneys were ineffective for not objecting to admission of the presentence investigation report, victim impact statements, and the prosecutor's comments regarding the unsworn nature of petitioner's statement in mitigation. The record is devoid of any indication, not to mention affirmative evidence, that the trial court relied upon improper "other acts" evidence, victim impact statements, or the prosecutor's statements impugning the unsworn nature of petitioner's statement in mitigation. For all of these reasons, the Court rejects petitioner's argument that his attorneys were constitutionally deficient for not objecting to this evidence.

Fifth Claim for Relief

In his fifth claim for relief, petitioner asserts ineffective assistance of appellate counsel on direct appeal to the Court of Appeals. Specifically, petitioner asserts that his appellate attorneys were constitutionally deficient for failing to raise the following issues on appeal:

5.1 That the trial court erred in failing to file findings of fact and conclusions of law in connection with its rejection of petitioner's motion to suppress statements;

5.2 That the trial court erred in finding a sufficient factual basis for petitioner's guilty plea since there is insufficient evidence demonstrating that petitioner possessed specific intent to kill Mrs. Stout;

5.3 That the trial court abused its discretion in failing to grant petitioner's request for a change of venue;

5.4 That the trial court abused its discretion in accepting petitioner's guilty plea without explaining the nature of the charge as required by state rules of criminal procedure and constitutional law;

5.5 That the prosecutor made improper

comments regarding the unsworn nature of petitioner's statement in mitigation;

5.6 Appellate counsel's failure to ensure that the presentence investigation report was made a part of the record on appeal; and

5.7 That trial counsel had been ineffective for failing to fully develop the record on the involuntary nature of petitioner's guilty plea.[12]

The Court will discuss the controlling standard for claims of ineffective assistance of appellate counsel and then address each of petitioner's allegations separately.

The Strickland test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel must provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986)(quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). The Court of Appeals for the Sixth Circuit has identified the following considerations that

---

12 As the Court noted in its earlier procedural default order, the habeas corpus petition includes two claims designated as the "fifth claim for relief." The first "fifth claim" is comprised of the allegations designated by the Court as 5.1 through 5.6. The only allegation of the second "fifth claim" that was properly presented to the state courts, and that is entitled to a review on the merits by this Court, is designated as 5.7.

ought to be taken into account in determining whether counsel on direct appeal performed reasonably competently:

(1) Were the omitted issues "significant and obvious?"
(2) Was there arguably contrary authority on the omitted issues?
(3) Were the omitted issues clearly stronger than those presented?
(4) Were the omitted issues objected to at trial?
(5) Were the trial court's rulings subject to deference on appeal?
(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
(7) What was appellate counsel's level of experience and expertise?
(8) Did the petitioner and appellate counsel meet and go over possible issues?
(9) Is there evidence that counsel reviewed all the facts?
(10) Were the omitted issues dealt with in other assignments of error?
(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir.), *cert. denied,* 528 U.S. 946 (1999). The Sixth Circuit cautioned, however, that this list is not exhaustive and need not produce a certain "score." *Id.* at 428. The Court will now turn its attention to each allegation of appellate counsel ineffectiveness asserted by petitioner.

5.1 Trial Court's Failure to Issue Findings/ Conclusions on Suppression Motion

Petitioner asserts that his appellate attorneys provided constitutionally deficient assistance in failing to assign as error the trial court's failure to issue findings of fact and conclusions of law in rejecting petitioner's motion to suppress statements. The Court is not persuaded that petitioner's appellate attorneys were constitutionally deficient in this regard, since petitioner's guilty plea effectively waived the ability to challenge non-jurisdictional defects on appeal.

As a general rule, a defendant who enters a plea of guilty waives all defects except lack of subject matter jurisdiction and the constitutionality of the plea itself.[13] *Ross v. Court,* 30 Ohio St. 2d 323 (1972). Thus, absent an express reservation of the right to have an issue decided on appeal,[14] a defendant who voluntarily pleads guilty waives all non-jurisdictional defects. *See, e.g., Tollett v. Henderson,* 411 U.S. 258, 267 (1973). By entering a guilty plea, petitioner waived the right to raise on appeal the propriety of the trial court's suppression rulings. *State v. Elliot,* 86 Ohio App. 3d 792, 795 (Ohio App. 12 Dist. 1993). *Huber Heights v. Duty,*

---

[13] Under Ohio law, a guilty plea to capital murder, which triggers a hearing to ensure that there is a factual basis for the plea, R.C. §2945.06, does not preclude the defendant from attacking the sufficiency of the evidence on appeal. *See State v. Taylor,* 30 Ohio App.23d 252, 261 (Ohio App. 8 Dist. 1972); *State v. Place,* 25 Ohio App. 2d 158 (Ohio App. 6 Dist. 1971).

[14] It would appear that, under Ohio law, a defendant must plead no contest in order to preserve a claim of error. *See* Ohio R.Crim. P. 12(H); *State v. Ruegsegger,* 64 Ohio App. 3d 626, 629 (Ohio App. 5 Dist. 1989).

27 Ohio App. 3d 244 (Ohio App. 2 Dist. 1985). In light of the foregoing, the Court is not persuaded that petitioner's appellate attorneys were constitutionally defective for failing to assign as error the trial court's failure to issue findings of fact in connection with its rejection of petitioner's motion to suppress statements. Petitioner waived the right to appeal that issue when he pleaded guilty. Claim 5.1 is clearly without merit.

5.2 Trial Court's Determination That There Was Factual Basis for Guilty Plea

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to challenge on appeal the trial court's determination that there was a sufficient factual basis to support petitioner's guilty pleas. Specifically, petitioner asserts that specific intent is the requisite culpability and that there was insufficient evidence demonstrating that he possessed specific intent to kill the victim. Petitioner argues, therefore, that his attorneys were ineffective for not challenging on appeal the trial court's determination that there was a factual basis supporting his guilty pleas to aggravated murder and the "escaping detection" specification.

The Court is not persuaded that petitioner's attorneys were ineffective in this regard. Although the issue whether there was a sufficient factual basis supporting petitioner's guilty pleas seems, at first glance, to be an obvious issue for appeal, given the fact that petitioner steadfastly maintained, even while pleading guilty, that it was his co-defendant, Daniel Wesley, who had actually shot and killed Mrs. Stout, it cannot be said under *Strickland* that petitioner's attorneys were constitutionally deficient, or that petitioner was prejudiced, by the omission of this issue from the appeal. Initially, it bears repeating, with respect to petitioner's insistence that his co-defendant was the triggerman, that

petitioner pleaded guilty to the offense of aggravated murder and the "escaping detection" specification. That is, petitioner stood in open court and stated, under oath, that ***he*** had purposely killed Mrs. Stout and that ***he*** had done so for the purpose of escaping detection, apprehension, trial, or punishment for the offense of aggravated robbery. Moreover, there was circumstantial evidence and testimony placing the murder weapon in petitioner's hand and establishing petitioner as the one who fired the fatal shots.[15] With that in mind, the Court notes first that counsel may very well have elected not to challenge the factual basis for petitioner's guilty plea, since there was sufficient evidence from which a reasonable factfinder could have found, beyond a reasonable doubt, specific intent to kill. Evidence and testimony revealed a methodical, calculated entrance into the Stout home by petitioner and Wesley for the purpose of committing robbery; that multiple gunshots were fired into the heads of Mr. and Mrs. Stout at point blank range; that petitioner and Wesley had reason to fear that they would be identified by the Stouts; and that petitioner and Wesley fled the Stouts' home, leaving them to die. Thus, counsel may very well have determined that this issue was not stronger than the issues they ultimately presented on appeal. *Mapes, supra,* 171 F.3d at 427-28. Moreover, the issue of whether there was a sufficient factual basis supporting petitioner's guilty pleas to aggravated murder and the "escaping detection" specification were essentially dealt with in other assignments of error concerning the trial court's decision not to permit petitioner to withdraw those guilty pleas. *Id.* Having reviewed the record, the Court cannot say that the

---

15 The Court is mindful, just as the state courts were, of affidavits and transcripts from the subsequent trial of Clyde Daniel Wesley, filed by petitioner in support of his motion to withdraw his guilty plea, attempting to show that Wesley had confided to a cellmate that he, and not petitioner, had actually killed Mrs. Stout.

decision not to pursue this issue on appeal was "an unreasonable one which only an incompetent attorney would adopt." *Id.* For these reasons, the Court rejects petitioner's claim that his attorneys on appeal were ineffective for failing to assign as error the trial court's determination that there was a factual basis supporting petitioner's guilty pleas.

5.3 That Trial Court Denied Request for Change of Venue

Petitioner argues that his attorneys were ineffective for not arguing on appeal that the trial court had abused its discretion in denying his motion for a change of venue. The Court is not persuaded that petitioner's appellate attorneys were constitutionally ineffective in this regard, since petitioner's guilty plea effectively waived the ability to challenge non-jurisdictional defects on appeal.

As discussed more fully in connection with claim 5.1 above, a defendant who pleads guilty waives all defects except lack of subject matter jurisdiction and the constitutionality of the plea itself. Even assuming he could plead guilty *and still* preserve issues for appeal, petitioner has not alleged, and it does not otherwise appear from the record, that his decision to plead guilty and proceed with the remaining phases of his trial was motivated by an abuse of discretion on the part of the trial court in denying his motion for a change of venue. By pleading guilty, petitioner waived his right to appeal any alleged errors pertaining to pretrial motions and venue. *See State v. Luna,* 96 Ohio App. 3d 207, 208 n.1 (Ohio App. 6 Dist. 1994). For the foregoing reasons, the Court finds that petitioner's appellate attorneys were not constitutionally ineffective for failing to challenge the trial court's decision denying the change of venue.

5.4 Trial Court's Failure to Explain Nature of Charge When Accepting Guilty Plea

Petitioner argues in claim 5.4 that his appellate attorneys were ineffective for failing to challenge on appeal the fact that the trial court accepted petitioner's guilty plea without explaining the nature of the charges to which he was pleading guilty. Although there arguably is some substance to petitioner's allegations, the Court is not persuaded that petitioner was prejudiced by appellate counsel's oversight.

The first prong of the *Strickland* test requires the Court to determine whether counsel committed an error or omission that was objectively unreasonable. The Court accomplishes this task by examining whether the issue omitted from the appeal was not only viable, but one that no competent attorney reasonably would have foregone. Under Ohio law, a trial court's responsibilities in ensuring that a guilty plea is made voluntarily are spelled out in Ohio R. Crim. P. 11(C)(2):

> In felony cases the court *** shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved ***.
>
> (b) Informing the defendant and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

The Ohio Supreme Court has held that, although strict compliance with Rule 11 (C)(2) is preferred, substantial compliance is sufficient, so long as the totality of the circumstances demonstrate that the plea was voluntary. *State v. Carter,* 60 Ohio St. 2d 34, 38 (1979); *State v. Stewart,* 51 Ohio St. 2d 86 (1977). With respect to ensuring that a defendant enters a guilty plea "with understanding of the nature of the charges," although Ohio courts have stopped short of requiring trial courts to explicitly inform the defendant of each element of the offense or to specifically ask the defendant if he understands the nature of the charge, there must be some basis in the record justifying a finding by the trial court that the defendant understands the charge. *See State v. Rainey,* 3 Ohio App. 3d 441 (Ohio app. 10 Dist. 1982); *see also State v. Blair,* 128 Ohio App. 3d 435 (Ohio App. 2 Dist. 1998)(defendant's affirmative response to whether he understood nature of attempted rape charge against him was, by itself, insufficient to support finding that he understood what state would have to prove where there was nothing in record to support finding that defendant was advised, by anyone, of what state would have to prove to convict him); *In re Flynn,* 101 Ohio App. 3d 778 (Ohio App. 8 Dist. 1995)(trial court is not required to inform defendant of each element of the offense, but must ensure that defendant understands the charge); *State v. Swift,* 86 Ohio App. 3d 407 (Ohio App. 11 Dist. 1993)(trial court is required

to clear up confusion on defendant's part as to element of crime before it can accept guilty plea).

In the instant case, it appears that the, trial court substantially complied with Ohio R. Crim. P. 11(C)(2) when accepting petitioner's guilty pleas. The trial court informed petitioner of the constitutional rights to which he was entitled and ensured that he understood he was waiving those rights; inquired whether petitioner was under the influence of drugs, alcohol, or mental defect that might impair his voluntariness; advised petitioner of the maximum penalties that he faced; inquired whether petitioner's guilty pleas had been obtained through promises, inducements, or threats; and, inquired whether petitioner had discussed his plea and was satisfied with his attorneys. (Mitigation transcript, at 11-18). The trial court did not inquire into petitioner's educational background in ascertaining whether he was capable of understanding the charges to which he was pleading guilty or the consequences of his guilty pleas. The trial court also failed to inform petitioner of the elements of the charges to which he was pleading or to inquire whether he understood the charges. The trial court did, however, inquire of petitioner's attorneys whether they had explained the elements of the offenses to petitioner. (Mitigation transcript, at 11). From the plea colloquy as a whole, there, appears to be a basis in the record justifying the trial court's finding that petitioner entered his guilty pleas "with full knowledge of the nature of the accusation and the consequences of the pleas," (Mitigation transcript, at 23), though that basis appears to have been somewhat scant.

Further, there were intimations at the time that petitioner entered his guilty pleas, as well as outright declarations in his subsequent appeals and collateral attacks, that petitioner did not fully grasp the nature of the charges to which he was pleading guilty. During the plea colloquy, when the trial court asked petitioner whether he was in fact

guilty of the aggravated murder charge and specifications one and four to that charge, petitioner did not immediately answer, prompting defense counsel to interject:

> MR STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of the his right to present evidence at a later time relative to his conduct, but he'll respond to that.

(Mitigation transcript, at 18). After petitioner's pleas had been accepted and petitioner had been sentenced to death, when petitioner later sought to withdraw his plea and to attack his conviction and sentence in postconviction, he asserted, (as he continues to assert here), that he did not understand that he was admitting to the actual shooting of Mary Jane Stout and that he only pleaded guilty because he was led to believe that he would be able to present evidence demonstrating that he was not the shooter, *i.e.*, the principal offender.

The trial court's failure to explain more fully the nature of the charges is fairly characterized as a non-frivolous, viable issue worthy of appeal. The trial court did not notify petitioner of the elements of the offenses to which he was pleading guilty and did not specifically ask him whether he understood the charges. The only basis supporting the trial court's finding that petitioner understood the nature of the charges was defense counsel's affirmative response to the trial court's question as to whether counsel had explained the elements of the offenses to petitioner. That petitioner denied being the actual shooter, or principal offender, was evidenced first in his reluctance to answer when the trial court asked whether he was in fact guilty of shooting Mrs. Stout and then throughout the hearing to determine whether there was a factual basis for his pleas,

when he fought to establish that it was his co-defendant, and not he, who had actually shot Mrs. Stout. The foregoing suggests that appellate counsel omitted a significant and obvious issue when they failed to assign as error the trial court's failure to explain the nature of the charges when it accepted petitioner's guilty plea. A tactical reason for not raising this issue on appeal is not readily apparent. It is likewise difficult to characterize this issue as one that a competent attorney could understandably overlook. Hence, petitioner has arguably satisfied the deficient performance prong of the *Strickland* test.

It is not enough, of course, for petitioner to demonstrate that appellate counsel's conduct fell below that of a reasonable attorney under prevailing professional norms. Petitioner must also show that, but for appellate counsel's error, the appeal would. have resulted in a different outcome. *Strickland, supra,* 466 U.S. at 694; *Tucker v. Prelesnik,* 181 F.3d 747, 754 (6th Cir. 1999). The prejudice inquiry has been defined in terms of whether counsel's errors were so egregious as to undermine reliability of and confidence in the result of the proceedings. *McQueen v. Scroggy,* 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied,* 521 U.S. 1131 (1997); *see also Lockhart v. Fretwell,* 506 U.S. 364, 369-370 (1993). The prejudice prong serves an important function -- namely, to ensure that otherwise valid criminal judgments are not lightly overturned because of attorney error that, in the end, did not prejudice the rights of the defendant or undermine the confidence in or reliability of the proceeding. *Cf. Lockhart, supra,* 506 U.S. at 368-69 (holding that the right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on ability of the accused to receive a fair trial). Under the prejudice prong, even assuming that appellate counsel could objectively be faulted for not raising the trial court's failure to explain the nature of the charges, the Court cannot find that petitioner was prejudiced by that error because it does not appear that the

state courts in this case would have accepted petitioner's argument about the trial court's failure to instruct on the elements of the offense. That is, the Court cannot find that appellate counsel's failure to raise that issue undermined the reliability of the outcome of petitioner's appeal. This Court finds that appellate counsel's failure to challenge the fact that the trial court did not explain the nature of the charges does not undermine the reliability of or confidence in the result of petitioner's appeal.

As noted *supra,* the failure of a trial court to use the exact language contained in Ohio R.Crim. P. 11(C) does not provide a basis for vacating the appeal. *See State v. Anderson,* 108 Ohio App. 3d 5, 9 (Ohio App. 9 Dist. 1995). "With respect to constitutional rights, the trial court's acceptance of a guilty plea will be affirmed if the court engaged in a meaningful dialogue with the defendant which, in substance, explained the pertinent constitutional rights "in a manner reasonably intelligible to that defendant." *Id.* (quoting *State v. Ballard,* 66 Ohio St. 2d 473, paragraph two of the syllabus (1981)). So long as the totality of the circumstances demonstrate a basis for the trial court's finding that the defendant understood the nature of the offense to which he was pleading guilty, the failure of the trial court to explicitly ask whether the defendant understood the nature of the offense does not provide a basis for attacking the constitutionality of the plea. *See, e.g., State v. Rainey,* 3 Ohio App. 3d 441, paragraph two of the syllabus (Ohio App. 10 Dist. 1982). The record reveals that the trial court received assurances from defense counsel that the nature and elements of the offense had been explained to petitioner and that petitioner was entering his guilty plea with a full understanding of the nature of the offense. That being so, it is highly unlikely that the state appellate court would have accepted petitioner's arguments about the failure of the trial court explicitly to ask him whether he understood the nature of the offense. *State v. Carter,* 60 Ohio St. 2d 34

(1974)(finding no error where trial counsel had given assurances that defendant understood nature of offense to which he was pleading guilty). Even assuming, therefore, that appellate counsel erred in not raising this issue on appeal, appellate counsel's omission did not prejudice petitioner. The Court is constrained to rejected claim 5.4.

5.5 Prosecutor's Comments About Unsworn Nature of Statement in Mitigation

Petitioner argues that his appellate attorneys were constitutionally ineffective for failing to assign as error the prosecutor's improper comments highlighting the unsworn nature of petitioner's statement in mitigation.

During closing remarks following the penalty phase of the trial, the prosecuting attorney made the following references to petitioner's unsworn mitigation statement:

"As to their purpose was in going to that house, the only stated purpose was to use the telephone but one way or the other, *if you believe the defendant's unsworn statement that he was handed this chrome colored gun by Wesley,* nevertheless the two of them went to that house armed with loaded 25 caliber automatic pistols.*** (emphasis added).

* * *

"It seems to me that all of these actions of the defendant speak louder than *anything he can say in an unsworn statement* or any statements in evidence as to what their purpose was in going to the Stout residence that night.*** (emphasis added).

* * *

"The only evidence that this defendant was other than cold and calculating at the time of that killing *was his own unsworn statement.* * * * (emphasis added).

"The only evidence to support some of the things Mr. Tingle would have you accept as the gospel truth is the unsworn statement of the defendant given here this morning, which is his right to do, but I ask you why the unsworn statement rather than being sworn to testify as every other witness? To avoid cross-examination. I had quite a few questions I would have liked to ask Mr. Stumpf about some of the these things he's saying in his statement and some of the things he's saying now in his unsworn statement, assuming he would have testified under oath in a similar manner. Why did he elect not to submit himself to cross-examination? How much weight should this Court give the unsworn statement of the defendant which was not subjected to the test of cross-examination? The Court is well able to consider that in determining what credibility to give the unsworn statement of the defendant."

(Mitigation transcript, at 525-535.)

The Court is not persuaded that petitioner's appellate attorneys were constitutionally ineffective for failing to challenge the prosecutor's remarks on appeal or that petitioner was prejudiced. The issue is a relatively weak one and thus, appellate counsel may have tactically chosen to forego the issue based on the chance that it might water down

petitioner's appeal. Prosecutors are permitted under Ohio law to comment when the defendant chooses to make an unsworn statement, although the scope of such comments is limited to explaining that the defendant's statement was not made under oath, in contrast to the testimony of all other witnesses. *State v. DePew,* 38 Ohio St. 3d 275, 285 (1988); *see also State v. Mason,* 82 Ohio St. 3d 144, 163 (1998); *State v. Davis,* 76 Ohio St. 3d 107, 119-120 (1996); *State v. Gumm,* 73 Ohio St. 3d 413, 421 (1995). Even assuming that the prosecutor's remarks in the instant case flirted with or exceeded the proper scope, any error could hardly be regarded as reversible, since petitioner was tried before a three-panel rather than a jury, thereby diminishing any possible prejudice. *See State v. Sowell,* 39 Ohio St. 3d 322, 328 (1988)(holding that erroneous admission of victim impact evidence during penalty phase did not warrant reversal because the case was tried before a three-judge panel, rather than a jury, and nothing in the panel's written opinion indicated that it relied on the improper evidence). The Court cannot find that, in failing to challenge the prosecutor's comments on the unsworn nature of petitioner's statement in mitigation, appellate counsel omitted a significant or obvious issue to petitioner's prejudice. Claim 5.5 must be rejected.

5.6 Counsel's Failure to Ensure Presentence Report Was Part of Appellate Record

Petitioner argues that his appellate attorneys failed to ensure that the presentence investigation report, which had been admitted and considered during the mitigation proceedings, was included in the appellate record. Petitioner argues that he was prejudiced by this oversight insofar as the appellate court did not have before it all of the information that was considered by the trial court in its sentencing determination. The Court is not persuaded that petitioner was prejudiced in this regard. A comparison of the trial court's sentencing opinion and the appellate court's decision reveals

that the appellate court considered and weighed the same mitigation factors, based on the same mitigation exhibits, that the trial court had considered and weighed – namely, petitioner's youth and petitioner's lack of a significant criminal history. Compare (Trial Court's Sentencing Opinion, Exh. D To Return of Writ), with (Appellate Court's Decision, Exh. T to Return of Writ). To that, the appellate court even added petitioner's remorsefulness. In the end, the appellate court concluded, just as the trial court had concluded, that the aggravating circumstances outweighed the mitigating factors. *See* (Appellate Court's Decision, Exh. T to Return of Writ, at 32). Based on the foregoing, there is no evidence demonstrating that petitioner was prejudiced by the alleged failure of his appellate attorneys to ensure that the presentence investigation report, admitted during the penalty phase, was included in the appellate record. Claim 5.6 must be rejected.

5.7 Trial Counsel's Failure to Develop Record re: Voluntariness of Plea

Finally, petitioner asserts that his appellate attorneys were constitutionally ineffective for not challenging on appeal the failure of petitioner's trial attorneys, in connection with petitioner's motion for a new trial, to develop more fully evidence demonstrating that petitioner's pleas were not entered knowingly, intelligently, or voluntarily. For reasons discussed more fully above, the Court is not persuaded that appellate counsel omitted an issue of significant and obvious strength because it is clear from the decisions of the appellate court and the Supreme Court of Ohio that they conducted a full review of the circumstances surrounding petitioner's guilty plea, and of the subsequent allegations regarding the fact that petitioner's co-defendant escaped a death sentence following his trial, and concluded that petitioner's plea had been voluntary and that petitioner was not entitled to withdraw his plea. That being so, it cannot be said that

appellate counsel unreasonably ignored an issue significantly and obviously stronger than those appellate counsel did raise on appeal, or that petitioner was prejudiced by the omission.

Sixth Claim for Relief

In his sixth claim for relief, petitioner argues that the trial court erred in its evaluation of the aggravating and mitigating circumstances by considering as aggravating factors matters which are not so designated by Ohio law and by not giving due weight to the mitigation evidence that petitioner presented. A review of the trial court's sentencing opinion reveals no constitutional error.

When a capital defendant seeks to challenge the weighing process employed by the sentencer in its determination of the death sentence, it is important to identify the constitutional boundaries that govern the weighing process. Only constitutional error warrants habeas corpus relief. "[T]he question to be decided by a federal court on petition for habeas corpus is not whether the state sentencer committed state-law error in relying on an adequately narrowed aggravating factor. (citation omitted). Rather, the federal constitutional question is whether such reliance is so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Richmond v. Lewis,* 506 U.S. 40, 48 (1992). With respect to petitioner's allegation that the trial court considered and weighed nonstatutory aggravating circumstances in its sentencing decision, it must be noted that Ohio is a "weighing" state. That is, "after a [sentencer] has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence." *Stringer v. Black*, 503 U.S. 222, 229 (1992). Assuming an unconstitutional aggravating factor has been considered by the sentencer in a weighing state, an appellate court may

independently reweigh the aggravating and mitigating circumstances, omitting the unconstitutional one, and determine if the sentence is nonetheless appropriate. *Stringer, supra,* 503 U.S. at 230-31; *Clemons v. Mississippi,* 494 U.S. 738, 750 (1990). To the extent that petitioner appears to be taking issue with the actual weighing process employed by the trial court, this Court's review is guided by the general rule that, the Constitution does not require that "numeric weights" be assigned to aggravating circumstances and mitigating factors; rather, the Constitution requires only that the sentencer' s discretion by sufficiently directed and limited as to prevent wholly arbitrary and capricious action. *See, e.g., Tuilaepa v. California,* 512 U.S. 967, 979 (1994)("A capital sentencer need not be instructed how to weigh any particular fact in the sentencing decision.").

The nonstatutory aggravating circumstances complained of by petitioner were cited by the trial court not as additional aggravating circumstances to be weighed against the mitigating factors, but merely as reasons why the aggravating circumstances outweighed the mitigating factors. *See e.g., Smith v. Anderson,* 104 F.Supp.2d 773, 819-820 (S.D. Ohio 2000). In its sentencing opinion, the three-judge panel found that the following statutory mitigating circumstances existed: petitioner's youth and petitioner's lack of a significant criminal history. The Court further found that the following aggravating circumstance existed: the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for other offenses committed by petitioner, to wit: aggravated robbery and attempted aggravated murder. The Court then set forth its reasons why the aggravating circumstances outweighed the mitigating factors:

1. The Court finds beyond a reasonable doubt that the Defendant was the principal offender in count one of the indictment.

2. The methodical manner in which the Defendant and his companion entered the house of the victims and assumed control of the victims. Examples:

   a. Wiping of fingerprints from the telephone.

   b. The dialogue of the Defendant with his companion.

   c. The initiative taken by the Defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

   d. Continual holding [of] both victims at gunpoint by the Defendant.

   e. The Defendant shooting the male victim at close range between the eyes.

   f. The Defendant firing a second shot into the head of the male victim.

   g. The Defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

3. Failure of the Defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing

immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The Defendant actively participated in the sale of guns stolen from the home of the victims.

6. The course of conduct of the Defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The Defendant's companion firing a gun into a passing vehicle in route.

8. The Defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault, and other crimes.

(*Id.*) It does not appear that the trial court considered or weighed against the mitigating factors an improper nonstatutory aggravating factors. Rather, the trial court provided a detailed list explaining why, in its view, the statutory aggravating circumstances outweighed the mitigating factors.

Further, even assuming that the trial court improperly considered nonstatutory aggravating circumstances, habeas corpus is not be warranted since the court of appeals and Ohio Supreme Court both conducted their own independent balancing of the aggravating circumstance against the mitigating factors, and neither appears to have considered improper, nonstatutory aggravating circumstances. *See Stringer v. Black, supra,* 503 U.S. at 230-31; *Clemons v. Mississippi, supra,* 494 U.S. at 750. The Ohio Supreme

Court, in its independent weighing of the aggravating circumstances and mitigating factors, found, as the trial court and appellate court below had found, that the single aggravating circumstance that petitioner had been found guilty of committing was that he murdered Mary Jane Stout for the purpose of escaping detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder. *State v. Stumpf,* 32 Ohio St. 3d 95, 105-106 (1987), exh.BB to return of writ. Against that aggravating circumstance, the Supreme Court undertook to weigh "all mitigating factors drawn from:" (1) nature and circumstances of the offense; (2) history, character, and background of petitioner; and (3) any factors listed in R.C. §2929.04(B). Ultimately, the Ohio Supreme Court concluded that the nature and circumstances of the offense were entitled to no weight as mitigation; and that the following six factors relating to petitioner's history, background, and character were entitled to *some* weight: history of fairly regular employment, good emotional stability, strong family background, average intelligence, lack of alcohol or drug abuse, susceptibility to being directed or dominated by others. *Id.* With respect to the statutory mitigating factors set forth in R.C. §2929.04(B), the Ohio Supreme Court found that petitioner's youth was entitled to "some, but not much weight;" and that petitioner's lack of a significant criminal history was entitled to "somewhat greater weight." *Id.* That court also considered the fact that petitioner turned himself in, pleaded guilty, and expressed remorse, but ultimately gave that cooperation little weight because it came only after one of petitioner's companions had identified petitioner as a participant and only after petitioner had changed his own story several times. *Id.* That the Ohio Supreme Court independently concluded that that single, statutory aggravating circumstance outweighed the mitigating factors bolsters this Court's finding that the trial court did not err in its weighing the aggravating circumstance against the mitigating factors, and that, even if it did, petitioner was not

prejudiced by that weighing. Thus, the Court concludes that petitioner's sixth claim for relief is without merit.

Seventh Claim for Relief

In his seventh claim for relief, petitioner asserts that the trial court improperly denied his motion to vacate his sentence or, in the alternative, to withdraw his guilty plea based on new evidence. The new evidence offered by petitioner, which evidence had not been previously available to him, was testimony presented by the state during Clyde Daniel Wesley's subsequent trial claiming that it was Wesley, and not petitioner, who had shot and killed Mary Jane Stout. According to Wesley's cellmate, Wesley had confessed to him that, after petitioner shot Mr. Stout with the chrome .25 caliber pistol, petitioner dropped that pistol and ran. Wesley then picked up the pistol and shot Mrs. Stout. Petitioner argues that the new evidence, *i.e.*, the testimony of Wesley's cellmate implicating Wesley as the actual shooter, entitled petitioner to withdraw his guilty plea or, in the alternative, to have a new sentencing hearing. By far the most troubling of petitioner's claims, this assertion, along with a recent decision by the Court of Appeals for the Eighth Circuit, prompted the Court to order the parties to submit supplemental briefs.

In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied, Gammon v. Smith*, -- S.Ct. --, 2000 WL 1337423 (Nov. 6, 2000), the Eighth Circuit granted a writ of habeas corpus because the state had violated the petitioner's due process rights when it presented factually inconsistent and irreconcilable evidence during different trials to obtain the convictions of two different defendants for the same murders. During the petitioner's trial, the prosecution relied on one of a co-defendant's two inconsistent versions of the events to obtain petitioner's conviction for the murders, and then relied on the other version at a subsequent trial to

convict someone else of the same murders. Pointing to the prosecution's use of "diametrically opposed testimony" during different trials to obtain convictions of different defendants for the same murders, as well as the fact that the petitioner could not have been convicted of felony murder under both theories, the Eighth Circuit found that the prosecution's actions rose to the level of a due process violation.

After the decision in *Smith v. Groose*, this Court directed the parties to file supplemental briefs addressing whether, or to what extent, the Eighth Circuit's decision might apply to petitioner's case. Petitioner argued that his conviction violates his rights under the Due Process Clause and must be set aside because the prosecution secured convictions against him and subsequently against Clyde Daniel Wesley by arguing that each had been the actual shooter. Respondent asserted that *Smith v. Groose* does not apply to petitioner's case since petitioner could have been convicted and sentenced to death even under the arguments and evidence that were presented during Wesley's subsequent trial, as an aider and abettor; neither the aggravated murder count nor the capital specification to which petitioner pleaded guilty required that he be the principal offender. The Court is constrained to agree.

The factually inconsistent and irreconcilable evidence at issue concerns who was the actual shooter, *i.e.*, petitioner or Clyde Daniel Wesley. During petitioner's culpability and penalty hearings, the state argued that petitioner shot and killed Mary Jane Stout. Later, during Wesley's trial, the state argued and presented testimony that Wesley shot and killed Mary Jane Stout. The critical difference between this case and *Smith* is that here, it was not necessary for the state to argue or prove beyond a reasonable doubt, nor was it necessary for the trial court to find, that petitioner was the actual shooter, *i.e.*, "principal offender." That is, petitioner

could have been convicted and sentenced to death as charged under the arguments and testimony presented during Wesley's trial.

Neither the aggravated murder count, nor the capital specification to which petitioner pleaded guilty, included as an element that petitioner was the actual shooter or "principal offender." Petitioner's indictment did not include a complicity, *i.e.*, aiding and abetting, count. Indeed, all indications from petitioner's indictment were that the state would proceed against petitioner as the actual shooter. Thus, petitioner's indictment was silent as to whether the state would proceed against him as the principal offender or as an aider and abettor. Under Ohio's aiding and abetting statute, however, it is not necessary for a defendant be charged as an aider and abettor to be convicted under aider and abettor liability; that a defendant is charged with a criminal offense is considered sufficient to place him on notice that the state could seek to convict him as either the principal offender or and aider and abettor. Subsection (F) of Ohio's aiding and abetting statute provides in relevant part that a charge of complicity may be stated in terms of that section or in terms of the principal offense. R.C. §2932.03(F). Ohio courts have construed R.C. §2923.03(F) to mean that a complicity conviction will be sustained under an indictment solely employing terms of the principal offense without an amendment to the indictment. *State v. Ensman*, 77 Ohio St. 3d 701, paragraphs one, two, and six of the syllabus (1991); *see also State v. Dotson*, 35 Ohio App. 3d 135 (Ohio App. 3 Dist. 1987)(holding that complicity statute allows defendant to be indicted either as the principal offender or as aider and abettor because statute gives sufficient notice that state could proceed against defendant under either theory).

Citing *State v. Taylor*, 66 Ohio St. 3d 295 (1993), petitioner asserted that, under Ohio law, a defendant convicted of aggravated murder and a capital specification

under aiding and abetting liability is not eligible for the death penalty. His assertion is not entirely accurate and his reliance on *Taylor* is misplaced. In *Taylor,* the defendant argued that the evidence was insufficient to establish the R.C. §2929.04(A)(7) death penalty specification attached to each aggravated murder count of which he had been convicted under aiding and abetting liability. The death penalty specification set forth in R.C. §2929.04(A)(7) requires proof either that the defendant was the principal offender or, if the defendant was not the principal offender, that the aggravated murder was committed with prior calculation and design. The defendant in *Taylor* argued that there was no proof either that he was the principal offender or that the aggravated murder was committed with prior calculation and design. The Supreme Court of Ohio agreed. With respect to the "principal offender" element, the court held that, while a defendant can be convicted of aggravated murder without being the actual killer, but by aiding and abetting the actual killer, such a finding cannot be "bootstrapped" into a finding that the defendant was the principal offender for purposes of making him eligible for the death penalty under R.C. §2929.04(A)(7).

Petitioner's reliance on *Taylor* is therefore misplaced, since neither the aggravated murder count, nor the death penalty specification, to which petitioner pleaded guilty required as an element proof that petitioner was the "principal offender." That is, even assuming that petitioner was convicted of the aggravated murder of Mary Jane Stout, not because he was the actual shooter, but because he aided and abetted the actual shooter, such a finding was not "bootstrapped" into a finding of any of the essential elements of the death penalty specification to which he pleaded guilty, *i.e.*, that the offense was committed to avoid detection, apprehension, trial, or punishment for the other offenses of aggravated robbery and attempted aggravated murder.

The circumstances surrounding petitioner's

conviction, and that of Clyde Daniel Wesley, do not fall squarely within the holding of *Smith v. Groose*. Since petitioner could have been convicted and sentenced to death as charged, even under the arguments and evidence subsequently presented by the state during Clyde Daniel Wesley's trial, the Court is constrained to find that the state's actions of arguing during and petitioner's hearing that he was the actual shooter, and then at Wesley's trial that Wesley was the actual shooter, did not violate petitioner's rights under the Due Process Clause.

That said, the Court is still troubled by the possibility that the state secured petitioner's death sentence by arguing that petitioner was the actual shooter, and then prosecuted Clyde Daniel Wesley as the actual shooter. As noted above, although the state was not required to prove that petitioner was the actual shooter, and the trial court was not required to find that petitioner was the actual shooter, the fact remains that the state *did* argue that petitioner was actual shooter and the trial court ***did*** find that petitioner was the actual shooter. In fact, the trial court cited its finding that petitioner was the actual shooter as a reason, and a very substantial reason, why the aggravating circumstance outweighed the mitigating factors.

As troubling as this fact is, however, it does not warrant habeas corpus relief because the Supreme Court of Ohio appears to have cured any misplaced reliance on the petitioner's having been the actual shooter. The Supreme Court, which is required to weigh independently the aggravating circumstances against the mitigating factors, considered the testimony of Clyde Daniel Wesley's cellmate – testimony the petitioner complained was unavailable when the trial court made its sentencing decision -- and found that the testimony was insufficient to tip the scales against imposition of death. In its discussion of the existence and weight any of the mitigating factors set forth in R.C.

§2929.04(B), the Supreme Court stated, "we find that the testimony of a cellmate during Clyde Daniel Wesley's trial is of minimal credibility, especially in light of [Stumpf's] guilty plea and the substantial evidence to the contrary adduced during [Stumpf's] sentencing hearing." *Stumpf, supra,* 32 Ohio St. 3d at 106. Thus, even assuming that the state's argument and trial court's finding that petitioner was the principal offender provided a basis for the trial court's determination that the aggravating circumstance outweighed the mitigating factors, the Supreme Court of Ohio cured any potential flaw by independently determining that the aggravating circumstance outweighed the mitigating factors, even in light of the testimony by Wesley's cellmate.

For the foregoing reasons, the Court finds that petitioner's seventh claim for relief is without merit.

Eighth Claim for Relief

Petitioner asserts in his eighth claim for relief that his constitutional rights were violated when his post-sentence motion to vacate his sentence was decided by only two judges following the intervening death of one of the judges comprising his original three-judge panel. The crux of petitioner's argument is that, because R.C. §2945.06 requires the bench trial of a capital defendant to be conducted by a three-judge panel, "[c]onsideration of post-sentencing proceedings by less than the entire panel is not authorized and violates petitioner's right to due process***." (Petition, doc.no. 2, at ¶80). Upon careful review, this Court is not persuaded either that the alleged deviation in state law -- a deviation that is only arguable, at best -- resulted in arbitrary or capricious action sufficient to state a claim in federal habeas corpus.

First, it is far from certain that state law was violated, as alleged by petitioner. With respect to a capital defendant's

decision to waive his right to a jury trial, and proceed instead with a bench trial, R.C. §2945.06 provides in relevant part:

> ***If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges***. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.***

The Supreme Court of Ohio summarily rejected petitioner's argument that the trial court erred in ruling on his post-sentencing motion to withdraw his guilty plea with only two of the original three judges.

> R.C. 2945.06 expressly provides that "[t]he judges or a majority of them may decide all questions of fact and law arising upon the trial***. Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

State v. Stumpf, 32 Ohio St. 3d 95, 105 (1987), exh.BB to return of writ. It is well settled that federal habeas courts do not sit to differ with or even revisit an interpretation by the

state's highest court of state law. *Gall v. Parker*, 213 F.3d 265, 304 (6th Cir. 2000); *Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir.), *cert. denied*, 525 U.S. 935 (1998); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). In light of the foregoing, petitioner's assertion that state law was violated when his post-sentencing motion to withdraw his guilty plea was decided by only two of the three original judges comprising his panel is not overly persuasive.

In any event, the scope of this Court's inquiry is confined to whether a state law error resulted in arbitrary and capricious imposition of the death penalty. *Cf. Richmond v. Lewis*, 504 U.S. 40, 50 (1992). Within the confines of that inquiry, the Court is not persuaded that the trial court's action in ruling on petitioner's post-sentence motion to withdraw his plea with only two judges resulted in or contributed to arbitrary and capricious imposition of the death penalty. Ohio courts describe R.C. §2945.06's three-judge-panel scheme not as a fundamental or structural protection, departure from which automatically undermines the validity of capital conviction, but as a procedural protection to help guard against arbitrary and capricious infliction of the death penalty. *See, e.g., State v. Green*, 81 Ohio St. 3d 100 (1998); *State v. Swiger*, 125 Ohio App. 3d 456, 463 (Ohio App. 9 Dist. 1998); *see also Cooey v. Anderson*, 988 F.Supp. 1066, 1080-81 (N.D. Ohio 1997)(regarding administration of Ohio's three-judge-panel provisions as application of procedural rules in death cases and not as application of death penalty itself). Thus, alleged irregularities in the administration of Ohio's three-judge-panel provisions, short of an allegation that either the finding of guilt or the sentence was not unanimous, invoke a case-by-case analysis to determine whether the alleged irregularity prejudiced the defendant.

In the instant case, two of the original three judges considered and rejected petitioner's post-sentencing motion

to withdraw his guilty plea or for a new sentencing hearing. Under a strict reading of R.C. §2945.06, it does not appear that post-sentencing matters fall within the realm of decisions that require unanimity, *i.e.*, finding the defendant guilty or not guilty and determining that the aggravating circumstance or circumstances outweigh the mitigating factors. The court of appeals and Supreme Court of Ohio reviewed the circumstances surrounding petitioner's motion to withdraw his guilty plea, and found not only that the trial court committed no error in deciding the motion with only two judges, but also that there was no legal or evidentiary basis supporting petitioner's motion; in so holding, those courts forcefully rejected petitioner's argument that the life sentence imposed on his co-defendant, Clyde Daniel Wesley, following Wesley's subsequent trial, undermined or otherwise affected the validity of petitioner's guilty plea or death sentence. For these reasons, the Court is not persuaded either that there was a violation of state law or that, assuming there was, the error resulted in or contributed to arbitrary and capricious imposition of petitioner's death sentence. Petitioner's eighth claim for relief is without merit.

Ninth Claim for Relief

In his ninth claim for relief, petitioner asserts that the trial court did not comply with R.C. §2929.03(F). That section provides that when a three-judge panel imposes a sentence of death, the panel is required to state in a separate opinion specific findings relating to the existence of any mitigating factors, the aggravating circumstances, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. Petitioner complains that trial court did not adequately identify aggravating and mitigating factors or assign them appropriate weight. The Court disagrees.

The trial court's sentencing opinion complied with

the letter and spirit of Ohio law. Section 2929.03(F) provides:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors***.

The trial court's sentencing opinion explicitly set forth those mitigating factors set forth in R.C. §2929.04(B) that the trial court found to exist, to wit: youth of the offender and lack of significant criminal history; its conclusion that none of the nine other mitigating factors offered by petitioner had been established by a preponderance of the evidence; the aggravating circumstance that petitioner was found guilty of committing, to wit: the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for other offenses committed by the defendant, aggravated robbery and attempted aggravated murder; and the reasons why the aggravating circumstance was sufficient to outweigh the mitigating factors. (Opinion, 09/24/84, exh.D to return of writ). The Supreme Court of Ohio, after reviewing the trial court's sentencing opinion, conclusively found that, "the three-judge panel thereby discharged its duties under RC. 2929.03(F)." *Stumpf*, 32 Ohio St. 3d at 102-103. Short of merely disagreeing with the trial court's decision, petitioner has not identified the manner in which the trial court's sentencing opinion fails to comply with R.C. §2929.03(F). That being so, the Court finds that petitioner's

ninth claim for relief is without merit

Conclusion

In an earlier Opinion and Order, this Court found that claims 1.2, 1.4, 1.6, 1.10, 1.12, 1.14, 3, and 5.a were barred by procedural default. For the foregoing reasons, the Court finds that petitioner's remaining claims are without merit. Accordingly, all of petitioner's claims are DENIED and this action is hereby DISMISSED. Petitioner is DIRECTED to file with this Court, in accordance with his supplemental brief filed on October 2, 2000, (doc.no. 24, at 2 n.2), and within thirty days from the date of this order, the transcript from Clyde Daniel Wesley's trial. To the extent that petitioner has moved to file a supplemental brief on the merits of petitioner's claims, (doc.no. 24, at 1 fn.1), that motion is DENIED as moot.

/s/GEORGE C. SMITH
United States District Judge

Date: 2\6\01

[Excerpt from Stumpf's Sixth Circuit Brief]

* * *

had either (a) consulted with and called a psychologist or (b) called the jail guards to testify. Obviously, the probability that the result would have been different is even greater when that evidence, plus the evidence that would have been introduced from the seventeen additional witnesses, are considered in their totality. Clearly, Petitioner was deprived of effective assistance of counsel at sentencing.

III. The District Court Erred In Denying Petitioner's Claim That His Guilty Plea Was Not Voluntary And Knowing And Therefore Was Obtained In Violation Of His Due Process Rights Under The Fourteenth Amendment

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court noted that "[a] plea of guilty... is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 342. When a defendant pleads guilty he simultaneously waives a number of constitutional rights including the right against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *See, Brady v. United States,* 397 U.S. 742, 748-749 (1970). As a result, the Due Process Clause of the Fourteenth Amendment requires that a plea of guilty be voluntary and intelligent in order for it to be constitutionally valid. *Id.* In general, a plea is considered voluntary when the defendant is fully aware of the direct consequences and the plea is not induced by threats or misrepresentations. *Id.* at 755. A plea is considered intelligent "when the criminal defendant enters it after receiving real notice of the true nature of the charge against him." *Brown v .Cockrell,* 2001 U.S. Dist. LEXIS 18933, at *10 (Tx.N.D.Ct., Nov. 16, 2001) *(quoting Bousley v. United States,* 523 U.S. 614, 618 (1998)).Whether a plea is both voluntary and intelligent is determined by looking at the

totality of the circumstances. *See, Brady,* 397 U.S. at 749; *Garcia v. Johnson,* 991 F.2d 324, 327 (6th Cir. 1993).

When the validity of a guilty plea is challenged in a habeas corpus proceeding, a court will uphold the plea only if it is knowing, voluntary, and intelligent. *See, James v. Cain,* 56 F.3d 662, 666 (5th Cir. 1995). In general, "[i]f a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea ...will be upheld on federal review." *Frank v. Blackburn,* 646 F.2d 873, 882 (5th Cir. 1980). To assess these elements, the reviewing court will look at the trial record. *Garcia,* 991 F.2d at 326.

Petitioner asserts that his guilty plea was not voluntary and intelligent and therefore was not valid. Specifically, Petitioner asserts that the fact that he received no benefit from pleading guilty to a capital murder charge, that he has consistently maintained his innocence, and that he did not know he would still be death eligible, demonstrate that his plea was neither voluntary nor intelligent. The District Court held that the trial record surrounding Petitioner's guilty plea "suggest both an air of regularity and that petitioner's plea was voluntary, intelligent, and knowing." (R 27 Opinion and order at 25, J.A. 1502). While Petitioner acknowledges that the record suggests an air of regularity and a valid plea, Petitioner asserts that the District Court erred in failing to view the record in light of Petitioner's steadfast insistence that he did not fire the shots that killed the decedent. This fact demonstrates that Petitioner did not have "a full understanding of what the plea connotes and of its consequences" as mandated by the Supreme Court in *Boykin*, 395 U.S. at 244.

In *Cupe v. Warden,* 2000 Conn. Super. LEXIS 2714 (Sup. Ct. CT., Oct. 12, 2000), the court found that the petitioner's guilty plea was not knowing, intelligent or

voluntary when his trial counsel failed to inform him that by pleading guilty he was giving up his right to appeal a motion to suppress evidence. In reaching this decision, the court noted that "[e]ven during the sentencing hearing the petitioner still claimed he wanted to appeal the denial of the Motion to Suppress." *Id.* at *11. The court then stated, "[it] is clear that he gave up a right unknowingly, and therefore, his plea was not made in a knowing, intelligent, and voluntary manner." *Id.* Similarly, in this case, Petitioner has steadfastly maintained that he did not fire the deadly shots, indicating that he did not have "a full understanding of what the plea connotes and its consequences." *Boykin*, 395 U.S. at 244.

In addition, Petitioner pled to an indictment that made him death eligible which indicates that he was not fully aware of the direct consequences of his guilty plea as required under the Due Process Clause. *Brady,* 397 U.S. at 755. Furthermore, Petitioner's insistence that his lawyer tell the court he expected to be given an opportunity to present evidence relevant to his conduct, lends further evidence to the fact that Petitioner did not understand the consequences of his guilty plea. (Guilty Plea Hearing at TR 18, J.A. 1652). Finally, the District Court noted that "the prosecuting attorney's explanation of the plea arrangements was somewhat difficult to follow, and that criminal defendants in such situations will often answer questions posed by the trial court without a clear understanding of each and every term uttered -- especially if advised by counsel to do just that." (R 27 Opinion & order at 27, J.A. 1504). This factor is especially important in Petitioner's case given that Petitioner has an IQ of 80, placing him in the borderline mental retardation range. (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit B, J.A. 994-1003; Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis,* 41 Ark. L. Rev. 725, 731(1988) (citing the Diagnostic and Statistical Manual of Mental Disorders). Again, whether a plea is

voluntary and intelligent must be determined in light of the totality of circumstances. *See, Brady,* 397 U.S. at 749; *Garcia v. Johnson,* 991 F.2d 324, 327 (6th Cir. 1993)

The testimony of individuals involved in the trial supports Petitioner's claim that his plea was not knowing and intelligent. Debbie Starkey, a social worker who assisted Petitioner's trial attorneys in preparing mitigation for his case stated in her affidavit that:

> The attorneys did not spend time explaining things to [Petitioner]. They would just tell him what to do. [Petitioner] didn't understand a lot of what was happening. [Petitioner] testified to what his attorneys told him to testify.
>
> It would not surprise me at all that [Petitioner] did not understand to what he pled guilty to.

(R 13 Return of Writ, Exhibit LL to Return of Writ, Amended Petition to Vacate at exhibit D at Paragraphs 19-20, J.A. 1013). Charlotte Gilbert, another social worker that assisted in preparing mitigation for Petitioner's case stated in her affidavit at post-conviction:

> John did not want to enter a guilty plea.
>
> The attorneys, Mr. Tingle and Mr. Stephens, would tell John what to do. John would go along with whatever the attorneys told him.

(R 13 Return of Writ, Exhibit LL to Return of Writ, Amended Petition to Vacate at exhibit E at Paragraphs 17-18, J.A. 1019). This testimony taken in conjunction with Petitioner's steadfast insistence that he was not the shooter and the fact that he pled guilty to an indictment that made him death eligible, demonstrate that his plea was neither

knowing nor intelligent.

The District Court held that Petitioner knew he was still death eligible because on the record, the trial judge apprised him of that fact. (R 27 Opinion & order at 26, J.A. 1019). While Petitioner acknowledges this, Petitioner again asserts that this excerpt from the record must be evaluated in light of other factors including his continual claim that he did not fire the shots and the fact that he received no benefit from pleading guilty to a capital offense. These factors show that although the trial judge apprised Petitioner that he was death eligible, Petitioner did not understand that death was a possible sentence. Petitioner's guilty plea cannot be knowing and intelligent unless he "understand[s] the significance and consequences of [this] decision." *Godinez v. Moran,* 509 U.S. 389, 401 n.12 (1993). *See, also, Boykin v Alabama,* 395 U.S. 238, 244 (1969) (defendant pleading guilty must have a full understanding of what the plea connotes and of its consequences).

The District Court also held that Petitioner's no benefit argument also fails because it is based on the fact that he "ultimately did not obtain the results [he] desired." (R 27 Opinion & order at 26, J.A. 1019). However, the fact that Petitioner received no benefit from pleading guilty is relevant not because in hindsight this appears to be true but because the lack of benefit demonstrates that Petitioner did not understand the consequences of pleading guilty-- specifically, the fact that he could still be sentenced to death. If he had, there would have been no incentive for Petitioner to plead guilty.

Petitioner also asserts that his guilty plea is invalid because trial counsel failed to advise him that he would receive no benefit from the plea bargain and that he would still be death eligible. When the ineffective assistance of counsel results in the defendant deciding to plead guilty, the

defendant has suffered a constitutional violation and the validity of his guilty plea is subject to attack. *See, Hill v. Lockhart,* 474 U.S. 52 (1985). In *Hill v. Lockhart,* the Supreme Court stated that the two-part standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984), for determining what constitutes ineffective assistance of counsel, applies to challenges to guilty pleas as well. *Id.* at 57-59. Therefore, in order for Petitioner to succeed on this claim, he must demonstrate (1) that trial counsel's performance fell below reasonable professional norms and (2) that there is a reasonable probability that but for trial counsel's deficient performance, he would not have pled guilty to the capital offense. *See, Strickland,* 466 U.S. at 687-688; *Hill v. Lockhart,* 474 U.S. at 58-59.

As to the deficient performance prong, Petitioner asserts that trial counsel was deficient for failing to inform him that he would still be death eligible after pleading guilty. Petitioner's mother, Loretta Procacina, stated in her affidavit at post-conviction that "Mr. Tingle told us that John would not get the death penalty because he pled guilty" and that "[she] was shocked when [Petitioner] got the death penalty because Mr. Tingle said he would not get it." (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit CC at Paragraphs 9 and 12, J.A. 895). Similarly, Petitioner's oldest sister, Vicki Stumpf Haley, testified at post-conviction that "[b]ased on what Mr. Tingle told us, I believe that because John pled guilty he would not get the death sentence." (R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit DD at Paragraph 6, J.A. 898). In addition, as mentioned earlier, Debbie Starkey, a social worker who assisted Petitioner's trial attorneys in preparing mitigation for his case stated in her affidavit at post-conviction that:

> The attorneys did not spend time explaining things to [Petitioner]. They would just tell him what to do. [Petitioner] didn't understand a lot of what was happening. [Petitioner] testified to what his attorneys told him to testify.
>
> It would not surprise me at all that [Petitioner] did not understand to what he pled guilty.

(R 13 Return of Writ, Exhibit LL to the Return of Writ, Amended Petition to Vacate at exhibit D at Paragraphs 19 and 20, J.A. 1013). These statements demonstrate that Petitioner was not aware that he would still be death eligible after pleading guilty.

In the guilty plea context, reasonable professional norms dictate that "an attorney insure that his client understood his rights, the nature of the charges and the possible sentence if convicted." *Houston v. Lack,* 625 F.Supp. 786, 790 (D.Ct.W.Dt.Tenn. 1986) (quoting *Jones v. Parke,* 734 F.2d 1142, 1146 (6th Cir. 1984). Furthermore, a guilty plea must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences" and trial counsel's function is to ensure that this awareness exists. *Brady,* 397 U.S. at 748. Because trial counsel failed to inform Petitioner that he would still be death eligible, Petitioner was not aware of the possible sentence and the consequences of his plea. This constituted deficient performance and renders his guilty plea invalid. In *Hill v. Lockhart,* 474 U.S. 52 (1985), the Court stated that the voluntariness of a plea depends on "whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 56. Clearly, trial counsel's failure to inform Petitioner that death was a possible sentence if he pled guilty, was outside this "range of competence."

In *Sparks v. Sowders,* 852 F.2d 882 (6th Cir. 1988), this Court granted relief to the defendant on the grounds that his guilty plea was invalid due to counsel's erroneous advise

concerning parole eligibility. In *Sparks*, counsel had informed the defendant that if convicted he could receive life without parole. As a result, defendant decided to plead guilty. In actuality, no such sentence existed in Kentucky at that time. This Court held that this type of misinformation constituted ineffective assistance of counsel. *Id.* at 885. The situation here is remarkably similar. The only difference is that while here, counsel misinformed the Petitioner by telling him the punishment was less severe than it actually was, in *Sparks*, the counsel misinformed the defendant by telling him the punishment was more severe than it actually was. Both cases involve situations where trial counsel misinformed the defendant about the consequences of pleading guilty. Petitioner asserts that a guilty plea is only voluntary "[i]f a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty." *Frank v. Blackburn*, 646 F.2d 873, 882 (5th Cir. 1980).

Furthermore, Petitioner can clearly demonstrate that he would not have pled guilty if his counsel had informed him that he would still be death eligible. This is evidenced by the fact that Petitioner received no benefit from pleading guilty. There was no reason to plead guilty to a indictment that made him death eligible. Furthermore, this prejudice was not cured by the trial court's instruction during the guilty plea proceeding. As argued above, despite the seeming regularity of the proceeding, Petitioner did not make a voluntary and intelligent plea, as evidenced by his steadfast insistence that he did not fire the deadly shots.

In conclusion, Petitioner submits that the totality of the circumstances indicate that his guilty plea was not voluntary or intelligent because he received no benefit from pleading guilty to a capital murder charge, he has consistently maintained his innocence, and he did not know he would still be death eligible due to his trial counsel's ineffective

assistance. Petitioner requests that this Court vacate Petitioner's guilty plea and sentence of death, and remand this case for a new trial.

IV. The District Court Erred in Rejecting Petitioner's Claims That the Ohio Death Penalty Statute is Unconstitutional

The Eighth Amendment to the United States Constitution and Article I, §9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). The Ohio death penalty scheme offends this bedrock principle in the following ways.

A. The "Felony Murder" Aggravating Circumstance in O.R.C. § 2929.04(A)(7) Is Constitutionally Invalid When Used To Aggravate O.R.C. § 2903.01(B) Aggravated Murder

"[T]o avoid [the] constitutional flaw of [vagueness and over breadth under the Eighth Amendment], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of [aggravated] murder." *Zant v. Stephens*, 462 U.S. 862 (1983). Ohio's statutory

* * *

INDICTMENT

THE STATE OF OHIO,
COURT OF COMMON PLEAS

Guernsey County, ss:

Of the Term of May in the year of our Lord,
one thousand nine hundred and eighty--four (1984).

COUNT ONE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA on or about the 14th day of May, 1984 at the County of Guernsey aforesaid,

did purposely cause the death of another person, to wit: Mary Jane Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, the offense of "Aggravated Robbery", in violation of Ohio Revised Code, Section 2903.01(B), entitled "AGGRAVATED MURDER", and contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION ONE TO THE FIRST COUNT:

The Grand Jurors further find and specify, under Ohio Revised Code, Section 2929.04(A) (3), in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above-named John David Stumpf, to wit: "AGGRAVATED ROBBERY" [& ATTEMPTED

AGGRAVATED MURDER (by interlineation).]

SPECIFICATION TWO TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04(A)(5) and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, to wit: Mary Jane Stout and Norman Stout.

SPECIFICATION THREE TO THE FIRST COUNT:

The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above-named John David Stumpf was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit the offense of "AGGRAVATED ROBBERY", and further that the above-named John David Stumpf was the principal offender in the commission of the offense of "AGGRAVATED MURDER" as charged in the First Count.

SPECIFICATION FOUR TO THE FIRST COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT TWO:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct, which, if successful, would have constituted the offense of "Aggravated Murder", by then and there purposely attempting to cause the death of another person, to wit: Norman B. Stout, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of "Aggravated Robbery", all being in violation of Ohio Revised Code, Section 2923.02(A), entitled "ATTEMPTED AGGRAVATED MURDER" (Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE SECOND COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT THREE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code,

Section 2913.01, to wit: the offense of "Grand Theft" of property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense, did then and there have a deadly weapon, to wit: a firearm, on or about his person or under his control, in violation of Ohio Revised Code, Section 2911.01, entitled "AGGRAVATED ROBBERY" (Aggravated Felony in the First Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO THE THIRD COUNT:

The Grand Jurors further find and specify, under and in compliance with Ohio Revised Code, Section 2941.141, that the above-named John David Stumpf had a firearm on or about his person or under his control while committing the aforesaid offense.

COUNT FOUR:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle, to wit: a 1976 Plymouth Sedan, Serial No. RH41G6A160499, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—MOTOR VEHICLES" (Felony in the Third Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

COUNT FIVE:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that John David Stumpf, R. D. 1, Box 41, Canonsburg, PA, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did with purpose to deprive the owner thereof, Norman B. Stout, knowingly obtain or exert control over a certain firearm, to wit: a .357 caliber Smith and Wesson, Model 28-2, Serial Number N552178 hand gun, by threat, in violation of Ohio Revised Code, Section 2913.02, entitled "GRAND THEFT—FIREARM" (Felony in the Fourth Degree), and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/J. R. Scott
Prosecuting Attorney

IN THE COURT OF COMMON PLEAS,
GUERNSEY COUNTY, OHIO

STATE OF OHIO,
Plaintiff, Case No. 9684

vs.

JOHN DAVID STUMPF, STATE'S RESPONSE TO MOTION TO WITHDRAW GUILTY PLEA

Defendant.

The defendant has moved the court for leave to withdraw his guilty plea or, in the alternative, for an order vacating the previously imposed sentence. The state opposes the motion in its entirety.

A plea of guilty is a complete admission of the defendant's guilt. By entering his guilty plea to the principal charge and to the specifications, the defendant admitted that *he* purposefully murdered Mary Jane Stout during the course of an aggravated robbery and that *he* did so for the express purpose of avoiding detection, apprehension, trial or punishment for his crime of attempting to murder Norman Stout during an aggravated robbery. In short, by pleading guilty, the defendant admitted that he killed Mary Jane Stout to make good his getaway. A guilty plea is the highest form of confession known in jurisprudence.

A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court. Criminal Rule 32.1. That rule provides as follows:

> "A motion to withdraw a plea of guilty or not contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of

conviction and permit the defendant to withdraw his plea."

After sentence has been imposed, a defendant seeking to withdraw a guilty plea bears the burden of establishing manifest injustice under Criminal Rule 32.1. *State v. Smith* (1977), 49 Ohio St. 2d 261. Construing the virtually identical federal counterpart to Ohio Criminal Rule 32.1, the United States Court of Appeals for the third circuit has observed that:

> "[t]he withdrawal of a plea of guilty is not a matter of right. A motion for leave to withdraw a plea of guilty and substitute a plea of not guilty is addressed to the sound discretion of the court and should be denied if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of his plea."
> *United States v. Ptomey* (3rd Cir., 1966), 366 F. 2d 759, 760.

Defendant herein makes no claim that his plea was not entered knowingly, intelligently and voluntarily and review of the record clearly demonstrates the plea was properly taken. Having confessed through his guilty plea in open court that he committed the offense, the defendant bears a heavy burden to demonstrate that manifest injustice will occur if his plea is not withdrawn. In point of fact, defendant has advanced absolutely no reason to permit withdrawal of his guilty plea.

> "Neither manifest injustice nor an abuse of discretion is shown merely because [a

> defendant] chose to test the water and found it too fervid."
> *United States v. Prince*, 533 F. 2d 205, 209 (5th Cir., 1976).

Defendant's motion to withdraw his guilty plea has no foundation in fact or law and should be overruled.

Defendant next urges that, based on testimony presented during the trial of his co-defendant, Clyde Wesley, the court should vacate the previously imposed sentence and conduct a new sentencing hearing. Again, the state opposes the defendant's motion.

It has long been recognized that where co-defendants are separately tried, identical results are not required. e.g. *State v. Goins* (1889), 46 Ohio St. 457.

> "One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only."
> *Ibid.*, syllabus paragraph three.

The criteria for imposing the death penalty in a capital offense are set forth in Section 2929.04 Revised Code. The requirement that the actor be either the principal or to have acted with prior calculation and design applies solely to the specification set forth in subparagraph seven. The defendant herein admitted his guilt to the specification set forth in subparagraph *three*; that he killed Mary Jane Stout to avoid detection, apprehension, trial or punishment for attempted aggravated murder (shooting Norman Stout in the head) and for aggravated robbery. That the death penalty is authorized for aiders and abettors is further exemplified in subparagraph

(B)(6), mitigation. Under that subparagraph, the sentencing authority may consider the offender's degree of participation in the offense in mitigation where the offender was not the principal offender. It is apparent that execution of an aider and abettor is authorized by R.C. § 2929.04. Therefore, while this court found from the evidence that defendant Stumpf actually shot Mary Jane Stout, that finding was not a condition precedent to imposing the death penalty.

Defendant Stumpf urges that testimony of James Eastman to the effect that Clyde Wesley admitted shooting Mary Jane Stout, entitles Stumpf to vacation of his sentence and a new sentencing hearing. We respectfully disagree. At Stumpf's hearing it was clear that he was the person who carried the chrome .25 caliber Raven pistol used to kill Mrs. Stout. Norman Edmonds testified he gave the gun to Stumpf in the car; Norman Stout was positive that Stumpf held the chrome pistol and that Stumpf shot him with the chrome pistol. Regaining consciousness after being twice shot in the head by Stumpf, Mr. Stout heard the two defendants in a discussion after which he heard the four additional shots which killed his wife, Mary Jane. The bullet from the top of Norman Stout's head was fired from the same gun which killed Mrs. Stout. The partial slug taken from between Mr. Stout's eyes had the same characteristics. The court is not required to accept Eastman's statement that Wesley admitted being the one who actually fired the gun which killed Mrs. Stout. Even so, as noted above, that finding is unnecessary to imposition of the death penalty.

Moreover, the three judge panel which made up the court in this case remains available to determine whether the death penalty would have been imposed even if defendant Stumpf were found not to have actually pulled the trigger of the gun which killed Mrs. Stout. The Ohio Supreme Court used this procedure in remanding a capital case to the original three judge panel with instructions to adhere to the

original judgment or enter such new judgment as was warranted by the evidence. See *State v. Staten* (1969), 18 Ohio St. 2d 13, 22 and *State v. Staten* (1971), 25 Ohio St. 2d 107, 108. This court is in the same position as the original triers of fact in *Staten*. If James Eastman's testimony, even if believed, would not alter the judgment of sentence, then no further hearing is required and the three judge panel may so state in a supplement to the original findings required by Section 2929.03 Ohio Revised Code. Only if the court determines that Eastman's testimony might warrant a different sentence, would a further hearing to take Eastman's testimony be necessary. Even deleting the finding that Stumpf was the principal offender and actually shot Mrs. Stout, the remaining findings of the court amply support the determination that the aggravating circumstances outweigh the mitigating factors.

CONCLUSION

The defendant has advanced no judicially cognizable basis for allowing him to withdraw his guilty plea. That portion of his motion should be overruled. The three judge panel being available, the court can determine whether the death penalty would still be imposed even assuming, *arguendo*, that defendant Stumpf did not actually fire the pistol which killed Mrs. Stout. If such is the case, the court may so state. Only if the court determines the need to hear Eastman's testimony would a further hearing be necessary.

The state urges the first course of action. Even deleting the finding that Stumpf was the principal offender, the remaining aggravating circumstances still outweigh any mitigating factors.

Respectfully submitted,

C. KEITH PLUMMER
Prosecuting Attorney

/s/ James R. Scott
James R. Scott
Special Assistant Prosecuting Attorney
Counsel for the State of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this 15th day of July 1985, to Lewis M. Tingle, 138 North Seventh Street, Cambridge, Ohio 43725, Counsel for the Defendant, by U.S. Mail, postage prepaid.

/s/ James R. Scott
James R. Scott

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21 and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

FILED COMMON PLEAS COURT
1984 DEC-3 AM 8:47
[illegible]
CLERK OF COURTS
GUERNSEY COUNTY

[3.] PROCEEDINGS

(Whereupon, on September 17, 1984, at 1:49 o'clock p.m., the following proceedings were had before the Court.)

JUDGE HENDERSON: Before I begin with the matter at hand, I would like to introduce those who are with me at the bench. I did hear the Bailiff very plainly recite our names, but possibly there might be some doubt as to which one's which.

I am John E. Henderson of Guernsey County and I have been selected to preside in this case. And seated on my right is Judge Warren Bettis of Columbiana County, who has been assigned here by the Supreme Court as one of the three Judge Court. And to my left is Judge Rice--Judge Raymond Rice of Tuscarawas County, retired Judge. He is also a part of the three Judge panel.

The case that is before us at this time is the case of The State of Ohio versus John David Stumpf. The case bears a number, Case Number 9684.

At this time I note present in court at the counsel table the Prosecuting Attorney of Guernsey County, Mr. James Scott and the Assistant Prosecuting Attorney, Keith Plummer. They represent the State of Ohio in this case. And at the rear counsel table representing the defendant [4.] is Attorney Craig Stephens of Ravenna and Attorney Lewis

Tingle of Cambridge, Ohio, and the defendant is present at the counsel table.

This is a case that has been brought to the attention of this Court by reason of an Indictment. An Indictment which was filed in this Court in the May term of 1984 and it consists of five counts and to the first count, which is that of Aggravated Murder, are specifications, first, second, third and fourth specifications. Count two is a count alleging Attempted Aggravated Murder and there is a specification to the second count. Count three is a count alleging Aggravated Robbery with a specification thereto and Count four is a specification of Grand Theft Motor Vehicle and Count five is a count alleging Grand Theft of a firearm. Those are the matters which are at the present time before this Court.

By way of explanation, this case was assigned for a jury trial and at the request and at the instance of the defendant with the advice and consent of his attorneys, the defendant did on the 23rd day of August, 1984, file with this Court a waiver as follows: I, John David Stumpf, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by duty and elect to be tried by a three judge panel in the Court to which the case may be pending. I fully understand that under the laws [5.] of this State I have a Constitutional right to a trial by jury.

Gentlemen of Counsel for the defense, I would ask at this time is the entire case and all counts before the Court for consideration at this time?

MR. TINGLE: Yes, Your Honor, it is.

JUDGE HENDERSON: Thank you. I have been advised that the State of Ohio has a motion at this time which it wishes to present. Mr. Scott?

MR. SCOTT: If it please the Court, as the Court is aware, we have been conferring with defense counsel for some time this morning or earlier today prior to these proceedings. I believe we have arrived at a negotiated plea situation and I wish to recite for the record the understanding that I have, subject to the concurrence and agreement of defense counsel as to the matters agreed upon, with the Court's permission.

JUDGE HENDERSON: You may proceed.

MR. SCOTT: Your Honor, the first matter that would be dealt with or the State would ask leave of Court pursuant to Criminal Rule 7 (D) and Ohio Revised Code Section 2941.30 to amend by interlineation specification one to the first count of the Indictment in order that it may read as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (3) in [6.] compliance with Ohio Revised Code Section 2941.14 that the aforesaid offense being the offense charged in the first count, the Aggravated Murder, was comitted for the purpose of escaping detection, apprehension, trial or punishment for other offenses--the words, "other offenses" are the first change, committed by the above named John David Stumpf, to wit: Aggravated Robbery and then we're adding the language "and Attempted Aggravated Murder". If that amendment is granted, the defendant then would enter a plea of guilty to the first count contained in the Indictment, being the Aggravated Murder count and a plea of guilty to specification one to the first count as amended; would also enter a plea of guilty to the second count in the Indictment, being the offense of--excuse me, back up. As to the first count he would also enter a plea of guilty to specification four to the first count. So, he will be pleading to the first count, the amended specification one to the first count and specification four to the first count. With regard to the second count, being the Attempted Aggravated Murder, he would

enter a plea of guilty to the Attempted Aggravated Murder and a plea of guilty to the specification to the second count. If the pleas of guilty to the two counts and the specifications I've mentioned are accepted by the Court, the Court would then proceed under Criminal Rule 11 (C) (3) to determine if there is a [7.] factual basis for the plea of guilty to the Aggravated Murder charge and the existence of the aggravating circumstances and if the pleas are accepted the State would then ask leave to enter a nolle pros as to specifications two and three to the first count and also a nolle pros as to the third, fourth and fifth counts in the Indictment and including the specification to the third count.

That is my understanding of the arrangement that we are proposing to the Court at the present time.

JUDGE HENDERSON: Thank you, Mr. Scott. Before ruling on the motion or amendment of the Indictment, I would ask Counsel for the defense if they wish to comment upon the statement of the Prosecutor. Mr. Tingle?

MR. TINGLE: If the Court please, the statement made by the Prosecuting Attorney is an accurate statement based upon our discussions with him earlier today and one upon which we are ready to proceed at this time.

JUDGE HENDERSON: I'm going to ask the Counsel for the defendant to inform the defendant that I am going to ask one question of the defendant very shortly and that question is this: Do you, John David Stumpf, affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by the defendant's counsel? Having forewarned the defendant of the question that is to [8.] be asked, I'm going to ask that question now. Mr. Stumpf, do you affirmatively acknowledge this agreement?

MR. STEPHENS: Would you repeat the question for him, Your Honor?

JUDGE HENDERSON: Mr. Stumpf, do you affirmatively acknowledge the agreement that has been stated by the Prosecutor and concurred in by your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well, you may be seated. Motion has been made by the Prosecutor---

MR. TINGLE: If the Court please, if I might interrupt. One matter that was not set forth in the statement of the Prosecuting Attorney, which I believe needs to be a matter of record at this time, the two specifications known as the gun specifications to count one, being specification number four and count two, the gun specification, I believe were to be stated by the Prosecuting Attorney to be the result of one transaction as part of our negotiations also.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: That is correct, Your Honor, within the meaning of Section 2929.71 the fourth specification or gun specification to the first count and the gun specification being the only specification to the second count are to be treated as part of the same because both offenses [9.] were committed as part of the same transaction within the meaning of 2929.71 of the Code.

JUDGE HENDERSON: Mr. Tingle, are you satisfied then?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: I'm going to once again in the interest of caution, ask the defendant now that there has been a clarification of the agreement, I'm going to ask the defendant again, Mr. Stumpf, do you affirmatively acknowledge this agreement between the Prosecuting Attorney and your attorneys?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: There has been a motion made to amend the Indictment, specifically specification one to the first count by changing the word "another" to "other", the word "offense" to "offenses" and by adding at the end thereof of that specification to the first count the words "and Attempted Aggravated Murder". Do I state your amendments correctly, sir?

MR. SCOTT: Yes, Your Honor.

JUDGE HENDERSON: And I believe those were the only amendments that had been offered to the Indictment?

MR. SCOTT: That's correct.

JUDGE HENDERSON: Is there objection?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: Mr. Scott, I'm going to ask you then — [10.] I will grant your motion. I'll ask that you amend your Indictment by interlineation. You may take the Court's file to your counsel table.

MR. SCOTT: May I approach the bench, Your Honor?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: Let the record show that I have amended here in open court by interlineation to make the changes as the Court has recited in the first specification the first count. Counsel have initialed and dated the change on the Indictment.

JUDGE HENDERSON: Could we have the defendant also, since he's being consulted on this matter?

MR. SCOTT: Let the record show that the defendant did initial on the margin the changes made by interlineation with the advice and assistance of his counsel and here in open court.

JUDGE HENDERSON: The Indictment seems to be in order and the Court is going to make certain inquiries of the counsel for the defendant and the defendant as to the proposed entry of the guilty plea. It is necessary that questions be asked and answers thoughtfully given in a case of this sort. I'm going to inquire of the attorneys for the defendant, have you fully investigated the facts and the law of this case and determined whether there exists any question of the admissibility of any claimed [11.] admissions, confessions or other evidence under Federal and State law and advised your client concerning the same?

MR. TINGLE: We have, Your Honor.

JUDGE HENDERSON: Have you informed your client of the elements of the offenses with which he is charged, of all defenses which may be available to him and of all of his Constitutional rights, both State and Federal?

MR. TINGLE: Yes, we have.

JUDGE HENDERSON: Are you willing that your client be sworn?

MR. TINGLE: To the extent of answering questions concerning his waiver of rights, yes, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, do you understand that you have a Constitutional privilege against self-incrimination?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything you say may be used against you and probably will be used against you, are you willing to waive your privilege against self-incrimination and be sworn to tell the truth concerning your understanding of your rights here in this court?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask at this time then that the Bailiff administer the oath to the defendant.

[12.] (Whereupon, John David Stumpf was sworn to tell the truth.)

JUDGE HENDERSON: Gentlemen of counsel, you may be seated.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel approached the bench and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their tables and the following proceedings were had before the Court.)

JUDGE HENDERSON: I think it would be appropriate that the defendant return to counsel table. Questions will be asked of him by the members of the judicial panel, but it is not necessary that he remain in the witness stand.

Mr. Stumpf, I'm going to ask you a number of questions and if you do not understand those questions you may inquire of your attorneys to better able you to understand everything that is being asked you. These have to do with the rights that you have as a person who has been accused of a crime. Do you understand that you have a constitutional privilege against self-incrimination?

[13.] THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: With a full understanding that anything that you say may be used against you, are you willing then to answer questions with regard to your understanding of your rights?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Now, you heard the questions that I put to your attorneys, I believe, relative to their advice to you and their counseling of you, did you not?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you personally acknowledge that your attorneys have informed and advised you as they say they have?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you satisfied with the services which they have performed for you?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Mr. Stumpf, do you have any physical or mental health problems today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of alcohol or any medicine or drug today? Let's take it one at a time. Are you under the influence of alcohol today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you under the influence of any [14.] medicine or drug today?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that you are charged with several offenses? The first offense being that of Aggravated Murder, that there have been two specifications being presented at this time in this particular proceedings, to wit: Aggravated Robbery and Attempted Murder and possession of a firearm while committing those offenses. Do you understand that?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you have been charged with the offense of Attempted Aggravated Murder, which is a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: For the first count, which is that of Aggravated Murder, you are subject to the following penalties: you are subject to being--to a sentence of twenty years without probation, that is, a sentence of life without probation for twenty years; a sentence of life without probation for a period of thirty years and the death penalty by electrocution could be imposed against you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that you would be subject under the--under specification four to [15.] the first count to three years incarceration before you begin to serve any other sentence?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that the attempted Aggravated Murder, which is set forth in count two, is a felony in the first degree and that you could be sentenced to be incarcerated for a period of four, five, six or seven but not more than twenty-five years? Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Do you understand also that for a felony of the first degree that you could be fined not more than $10,000.00?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And that you could receive both the fine and the incarceration, which I have mentioned?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Are you presently on probation or parole, sir?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Do you understand that if you plead guilty you will waive, that is, you will give up the right to a jury trial or trial by the Court; the right to be presumed innocent and until proven guilty beyond a reasonable doubt; the right to confront and to question [16.] the witnesses against you and to have compulsory process for obtaining witnesses in your favor; the right to remain silent or to testify at your trial as you may choose and that no inferences may be drawn if you choose not to testify at your trial. Do you understand that you may be giving up those rights?

MR. STEPHENS: Your Honor, with reference to that, we have explained that to the defendant. He was going to respond but we have informed him that there is, after the plea, a hearing or trial relative to the underlying facts so that he is of the belief that there will be presentation of evidence and I wanted to make that clear to the Court with reference to his right of waiver of trial to Court.

JUDGE HENDERSON: I understand that and I appreciate your bringing that to my attention, Mr. Stephens. Of course in the sentencing portion of this trial you do have those rights to speak in your own behalf to present evidence and testimony on your own behalf. My statement to you and my question to you was intended to except those rights that you do have. Counsel, is that satisfactory?

MR. STEPHENS: Yes, sir.

JUDGE HENDERSON: Thank you. Do you understand that if you have made any admission or confession or if any evidence against you was seized, you have the right to have a preliminary hearing on the admissibility thereof [17.] before you plead guilty or are brought to trial. Do you want such a preliminary hearing or do you want the Court to accept your plea of guilty to the counts which your counsel has mentioned?

MR. STEPHENS: Your Honor, we have previously explained to the defendant that he has been afforded at one time an opportunity for a preliminary hearing. He understands that, he does not want any preliminary hearings prior to this plea.

MR. SCOTT: May I address the Court a moment?

JUDGE HENDERSON: Yes, sir.

MR. SCOTT: I think the record should reflect there was a timely motion filed to suppress certain evidence, particularly statements made by the defendant, that the Court has heard the evidence with respect to that motion and has heretofore denied the motion to suppress with regard to those matters.

JUDGE HENDERSON: Yes, sir. Anything further?

MR. SCOTT: Nothing further.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Do you understand, Mr. Stumpf, that if any promises or inducements have been made to you by any person to cause you to plead guilty that they are not binding upon the Court, that if you plead guilty the

Court, this panel of Judges, will decide your sentence after [18.] considering all of the evidence that is to be presented and evidence in mitigation of punishment and after considering a presentence investigation, report and recommendation approved and prepared by the probation department and that you may receive the maximum sentence prescribed by law. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Have any promises or inducements been made to you, sir, other than the agreement which you have affirmatively acknowledged on the record?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: Are you in fact guilty of count one with specification one and specification four?

MR. STEPHENS: One moment, Your Honor. Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.

JUDGE HENDERSON: At no time am I implying that the defendant will not have the right to present evidence in mitigation hearing and I do appreciate it, Mr. Stephens, that you bring this to the attention of the Court. And I'm going to ask that the defendant, himself, respond to the question that I asked with that understanding that he has the right to present evidence in mitigation. I'm going [19.] to ask the defendant if he is in fact guilty of the charge set forth in Count one, including specification one and specification four?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: I'm going to ask you if you are in fact guilty of the charge set forth against you in Count two of the Indictment, which is Attempted Aggravated Murder, a felony in the first degree?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: And I'm going to ask you and then I'll explain my question and give you an opportunity to answer. There is a specification to the second count, that of having a firearm on or about your person or under your control while committing the aforesaid offense of Attempted Aggravated Murder. I understand that by reason of the statement of the counsel for the State of Ohio that there are two specifications of a similar purport and that the two will be considered as one, but are you in fact guilty of this specification to the second count?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: The Court would at this time ask the defendant be seated. I'm going to ask that my associates here at the bench have an opportunity to ask such questions at this time as they desire and I'll ask Judge Bettis, is there anything that you desire?

[20.] JUDGE BETTIS: No questions.

JUDGE HENDERSON: Judge Rice?

JUDGE RICE: No questions.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: If the Court please, if the Court is inclined at this point after having made full inquiry of the

defendant to accept the--to propose that the defendant actually enter the pleas as proposed and accept the pleas as proposed or as entered, then the State would at that time ask leave to nolle the remaining portions of the Indictment.

JUDGE HENDERSON: Before I get to that point, I would also ask counsel for the defense if there's anything further at this time?

MR. TINGLE: Not at this time, Your Honor.

MR. SCOTT: Could we approach the bench for a moment, Your Honor?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the [21.] following proceedings were had before the Court.)

JUDGE HENDERSON: It has been brought to the Court's attention, and properly so, that the matter of sentencing left to the discretion of the Court in this matter based upon the evidence that is presented and the evidence that is presented in mitigation of punishment and one thing that was not mentioned by this speaker is in the matter of punishment that it is possible that Count one and Count two could run consecutively or concurrently at the instance of the Court. And I want to ask the defendant if he understands that could be the case?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: You understand then that the matter of sentencing itself, within the frame work of the statute with regard to sentences to be imposed in such cases, rests then with this panel of Judges?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Thank you. You may be seated. Now, it is necessary in a capital case that, the Court hear evidence so that it is satisfied that the offenses to which a plea of guilty is offered actually were committed by the defendant. I'm sure that everyone can understand the reason for that. This is a serious offense--offenses I should say, and this panel does not desire to have the [22.] defendant enter a plea of guilty and then the panel not be satisfied that the offense to which the plea of guilty was offered was actually committed by the defendant. So, there will be a proceeding, a trial if you will, as to the necessary elements to establish the guilt of the defendant, even though he offers a plea of guilty. I have asked the defendant if he is in fact guilty of those charges and I'm going to ask him in another form. The defendant has heretofore when he appeared before the Court entered pleas of not guilty to those offenses and I'm going to ask then if the defendant desires to withdraw his pleas of not guilty to the first count and specification one and four and to the second count with its specifications? Is it your desire after counseling with your attorneys to withdraw your pleas of not guilty to those offenses?

THE DEFENDANT: Yes, sir.

JUDGE HENDERSON: Very well. I'm going to ask you now, formally, how do you plead to Count one with specifications one and four?

THE DEFENDANT: Guilty.

JUDGE HENDERSON: How do you plead to Count two with specification?

THE DEFENDANT: Guilty, sir.

JUDGE HENDERSON: You may be seated. Where pleas of guilty are accepted and subject to the presentation of [23.] evidence the Court does find that your pleas have been made freely, understandingly and voluntarily with full knowledge of the nature of the accusation and the consequences of the pleas and without undue influence, compulsion, duress or promise of leniency.

Mr. Scott, you had moved the Court to nolle certain pleas. I'm going to ask that you withhold that action until such time as we have had our evidentiary hearing.

MR. SCOTT: That's fine, Your Honor.

MR. STEPHENS: Your Honor, may we approach the bench?

JUDGE HENDERSON: Yes, sir.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

MR. SCOTT: Your Honor, consistent with the sidebar conference, I would at this time, as previously stated as part of the agreement here, move to nolle the remaining counts, which I believe are three, four and five and also the specifications two and three to the first count and [24.] request that the Court defer ruling on the motion to nolle

until following the evidentiary hearing and the determination of the Court as to the degree of offense the factual basis for the plea of guilty to the first count which I believe is the only one the statute requires an evidentiary hearing upon that is the Aggravated Murder and ask that the Court defer ruling on the motion to nolle until that time.

JUDGE HENDERSON: Is there objection, gentlemen?

MR. TINGLE: No objection, Your Honor.

JUDGE HENDERSON: The Court then will defer ruling upon the motion to nolle.

It is 2:30 and a little bit past that. It would seem appropriate to the Court that the Court recess until 9:00 o'clock tomorrow morning at which time the State of Ohio should be ready then to present evidence with regard to the matters set forth in the Indictment. Is that agreeable with counsel?

MR. SCOTT: For the State, yes, Your Honor.

JUDGE HENDERSON: The Defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: Then the Court should ask my fellow Judges, is that agreeable with you?

JUDGE BETTIS: Yes, sir.

JUDGE HENDERSON: And with you, sir?

[25.] JUDGE RICE: Agreeable, sir.

JUDGE HENDERSON: Then at this time, Mr. Bailiff, you may adjourn Court for the day.

(Whereupon, at 2:33 o'clock p.m. Court recessed to reconvene at 9 o'clock a.m., September 18, 1984.)

* * *

[26.] (Whereupon, at 9:11 o'clock a.m. September 18, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: Case number is 9684. Case is State of Ohio versus John David Stumpf. As announced by the Bailiff, the Judges sitting with me in this case, Judge Bettis on my right, Columbiana County; retired Judge Raymond Rice of Tuscarawas County on my left. I'm John E. Henderson.

I would like to call to the attention of any of the members of the media, the press, television, radio, certain rules for broadcasting and photographing court proceedings called to your attention in this case. That representatives of the media shall notify the Judge in advance of a desire to film, video tape, record, take photographs of a witness at the beginning of the witness's testimony and the filming, video taping, recording or taking of photographs of victims or witnesses who object thereto shall not be permitted. The assignment Commissioner has the entire rule with regard to conditions for broadcasting and photographing court proceedings. Those of you have, in accordance with the rules, asked permission to do so have been given copies of these conditions.

Gentlemen of Counsel, are you ready to begin this [27.] morning with the trial of this case?

MR. SCOTT: State's ready, Your Honor.

MR. TINGLE: Defendant's ready, Your Honor.

JUDGE HENDERSON: Let the record show that the attorneys for the State of Ohio are present and that the attorneys for the defendant are present and the defendant is present in court.

Mr. Scott, do you desire to present an opening statement?

MR. SCOTT: If it please the Court, Mr. Tingle and Mr. Stephens, I would like to briefly state for the Court's information in advance the general scenario of facts which I think the evidence will prove in this case.

On the date of this shooting incident of May 14, 1984, Mary Jane Stout and Norman Stout, husband and wife, both 54 years of age, lived alone in their home located in the western part of Guernsey County about a mile this side of the Muskingum County line and adjacent to Interstate Route 40. The house lies about a hundred yards north of Interstate 40 on County Road 44, which passes beneath the interstate by means of an underpass.

This defendant at that time, John David Stumpf, resided in the area of Cannonburg, Pennsylvania, which is in the vicinity of Washington, Pennsylvania.

Clyde Daniel Wesley, who is a separately charged [28.] defendant with this same crime and who is in the State of Texas contesting extradition, had also previously lived in the same area of Pennsylvania as the defendant; and the two of them were close friends and had associated together prior to Mr. Wesley leaving for Texas, which he sometime ago--at least several months before May 14th he had gone to Texas

to the area of Greenville, Texas near Dallas were his mother, I believe, lives who is Beverly Hickerman.

While in Texas Mr. Wesley met an acquaintance at work while they were working construction one Norman Leroy Edmonds. They decided to leave Texas on May 11th and travel to Washington, the Washington, P.A. area, arriving there on Sunday, May the 13th. They were driving Edmonds' brown and tan 1977 Pontiac Grand Prix bearing Texas license plates QAX 229. Their reason for going to the Washington, Pennsylvania area was Wesley had a former wife and child living in that area. The following day, being Monday, May the 14th, they got together with this defendant in Cannonsburg, Pennsylvania, which I understand is some ten or fifteen miles or so from Washington. They spent the afternoon of Monday, May 14, merely shooting pool and idly passing their time.

Now, at the time they came to Washington, Pennsylvania, Wesley had in his possession a black 25 caliber Armi, A-R-M-I automatic pistol, which he owned for some time, [29.] which he regularly carried. Edmonds had in his car two handguns, a chrome colored 25 caliber Raven automatice pistol and a 9 milimeter black colored automatic pistol, both of which he purchased in Texas within a week or two prior to their leaving for Washington, Pennsylvania.

During the course of the day, that is, Monday, May the 14th of '84, the three of them had been talking about guns and during the course of the afternoon or early evening Edmonds turned his chrome colored 25 caliber Raven automatic over to this defendant, John David Stumpf, and he never did get it back during the course of the events thereafter.

While driving around in the Pontiac automobile and for no apparent reason they came into Ohio and eventually

came into Guernsey County, arriving here somewhere around 9:00 o'clock p.m. or shortly before that. As they approached the overpass in the area of the Stout residence where County Road 44 passes beneath the Interstate 70 they noticed the Stout residence, decided to stop to see what they could steal from the residence. Edmonds was driving the car at the time and at the request of one of the other two, that is, either the defendant or Wesley, stopped the car and the defendant and Wesley left the car and walked towards the house. At that time the defendant still had in his possession the 25 caliber Raven chrome colored pistol [30.] and Wesley had in his possession the 25 caliber black colored pistol. Edmonds remained with the car and the 9 millimeter handgun was still in the car.

As far as Edmonds is concerned, he remained with the car and sometime later he saw the outside lights of the Stout residence go on and saw a car being backed from the garage area of the Stout residence. He became frightened and left, continuing in a westerly direction on Interstate 70 into Muskingum County. By reason of the fact that he was low on gas he stopped at the Norwich exit west of New Concord, pulled up to the station, ordered the gas, went in the station, used a pay phone to make a collect call to his father in Texas. He discovers he had no money to pay for the gasoline when he came back out. He left without paying. There were two young men there passing the time with the station attendant and saw the sequence of events, got in their own car and chased Edmonds in a westerly direction on Interstate 70. At the Zanesville Airport exit Edmonds decided to turn around and go back to Washington, Pennsylvania because he didn't know where his two friends were. He pulled off on the ramp and pulled over to stop. At this time the two young men from the station pulled up behind him, accosted him about the gas. Edmonds fired several shots from the 9 millimeter, frightened them off. He then continued back and went to Washington, P.A. In the

[31.] meantime back at the Stout residence this defendant and Mr. Wesley approached the residence, knocked on the door, was answered by Mr. Stout. They told Mr. Stout they had car trouble and needed to use the telephone. Mr. Stout admitted them, they used the telephone. Thereafter both of them, that is, the defendant and Mr. Wesley each pulled their handguns and told Mr. and Mrs. Stout it was a holdup. While this defendant held Mr. and Mrs. Stout at gunpoint, Wesley looked through the house for items to steal, including the billfold of Mr. Stout from the area of the kitchen table and a 357 caliber Smith and Wesson revolver located in the bedroom. During the course of events they herded Mr. and Mrs. Stout down a hallway to a bedroom where this defendant, John David Stumpf, continuted to hold them at gunpoint. At this point, because of the demeanor and conduct of the defendant, Mr. Stout--or strike that, Mr. Stumpf, Mr. Stout became convinced that both he and his wife were going to be killed any way and he decided to try to rush Stumpf in an effort to try to save his wife, if possible. He did rush the defendant but before he could do anything he was shot in the face and later at a second time in the top of the head, rendering him helpless by this time. Wesley was also--who had been in the other bedroom looking for things, was in the area. He also fired his black 25 caliber handgun one time, but apparently it misfired because [32.] there's no evidence of any further shots fired from that handgun. As a result of his wounds, Mr. Stout fell to the floor in the bedroom across the hallway from where Mrs. Stout was seated on the bed. He was still alive but unable to move from where he lay on the floor. Believing that he had killed Mr. Stout, this defendant than turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and shot her four times. Three times in the left side of the head and neck and one time in the wrist, obviously in order not to leave anyone available to identify him. Two of the bullets entered her brain and she died instantly.

Stumpf and Wesley then went to the basement of the Stout residence, taking with them the 357 caliber revolver they gathered up earlier; entered a 1976 Plymouth Fury automobile registered in the name of Mary Jane Stout and stole the vehicle from the residence. They returned to Pennsylvania in the stolen vehicle; abandoned it in the area of Waynesburg, Pennsylvania in an isolated area, after having wiped the car clean of prints. This car was later recovered a day or two later by the Pennsylvania State Police. Thereafter Stumpf and Wesley then went back to a friend's house in Washington where they had been earlier and met up with Edmonds, who had gone to that same location.

Edmonds decided after all these events that happened [33.] that he was going back to Texas but he needed some money to get there. He decided to sell the 9 millimeter pistol he had. The next day, being Wednesday, May the 16th, the three of them went to Cannonsburg where Stumpf, this defendant, arranged for the sale of the 9 millimeter pistol of Edmonds and also the stolen 357 caliber revolver in the possession of Wesley to a man named John Dino, whom the defendant knew. These handguns were later recovered by the Cannonsburg Police Department and turned over to the Guernsey County Sheriff's Department. After the sale was completed, Wesley and Edmonds left for Texas.

In the meantime, the shootings were discovered by the New Concord Police Department about an hour after they took place, as a result of a telephone call from Chris Stout, the son of these two--of Mr. and Mrs. Stout, who was concerned that he received no answer when he tried to telephone.

Upon the discovery of the body of Mrs. Stout the New Concord Police notified the Guernsey County Sheriff's Department, who went to the scene.

In the meantime, with regard to the Muskingum County incident involving the gas station, the two individuals who had chased Mr. Edmonds reported the matter to the authorities by means of the Texas license plate, which the two of them had gotten from the vehicle and tracing the phone call made [34.] from the station they were able to identify Edmonds as the individual involved and issued a warrant for his arrest. He was thereafter arrested in Dallas County, Texas on May the 18th. After his arrest Edmonds was interviewed by Detective William Stout of the Dallas County Sheriff's Department concerning the Muskingum County incident, because the local authorities were proceeding on the assumption that the Guernsey County shooting and the incident in Muskingum County were factually connected. He also interviewed him concerning the Guernsey County shooting. At that time Edmonds gave a statement as to what had taken place and furnished the names of this defendant, John David Stumpf, and Clyde Daniel Wesley as the other individuals involved.

On May 21st arrest warrants were issued for both Wesley and Stumpf and as I mentioned, Wesley is still in Texas contesting extradition. This defendant, John David Stumpf, waived extradition in Washington, P.A. and was returned to Guernsey County by Lt. VanHorn of the Guernsey County Sheriff's Department on May 21, 1984 and has been incarcerated since then.

The Grand Jury of the county returned this Indictment against the defendant on June 14, 1984.

This, in summary form, Your Honor, is the facts the State would expect to prove. I would state that we did--counsel worked some later hour last night. We have an [35.] extensive set of stipulations in the process of being typed. We anticipate that those will be available before noon, but at

this time I would like to proceed with the presentation of some live testimony.

JUDGE HENDERSON: Mr. Tingle, do you have any statement you wish to make?

MR. TINGLE: If the Court please, the hearing at this time, our understanding that that hearing and this proceeding is to establish that there is a basis in fact for the pleas of guilty entered by this defendant, pleas to the first count of the Indictment with the first specification, being the specification which does authorize the death penalty in this case. Following the hearing for this limited purpose the defendant anticipates proceeding then to a mitigation hearing at which time further evidence will be developed on behalf of the defendant. Suffice it to say, there are some disputes with some of the factual situations stated by the Prosecutor on some of the essential facts – much has been stipulated and will be offered to the Court in the form of a stipulation by agreement of counsel and the defendant. But at this time the scenario as outlined by Mr. Scott does follow the sequence of events as they did occur, except for the statements as to the actual shooting of Mary Jane Stout, which the defendant believes the evidence will show occurred at the hands of Daniel Wesley. The same Daniel Wesley who [36.] just prior to that time shot a passing motorist in Belmont County, Ohio. The evidence will also show, we believe, that the shooting of Norman Stout occurred in a moment of panick not in a moment of prior calculation and design. The evidence will also show that upon learning of the warrant having been issued for his arrest in Pennsylvania this defendant did turn himself in to the Pennsylvania authorities and since that time has been held in custody. Thank you.

JUDGE HENDERSON: Thank you. Mr. Scott?

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21 and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

FILED COMMON PLEAS COURT
1984 DEC-3 AM 8:47
[illegible]
CLERK OF COURTS
GUERNSEY COUNTY

* * *

[371.] in the record as I recall it was because of things that had happened earlier or because of things that had happened before. So, I would still assert that the entire matter of the events in Belmont County are irrelevant to any material issue in this case. It seems to me that there are -- Wesley is not the defendant on trial here today, his conduct.

JUDGE HENDERSON: Thank you, Mr. Scott. The proffer will be admitted. Mr. Tingle, you indicated that you had motions? You have not officially rested your case yet.

MR. TINGLE: If the Court please, I indicated two motions. The first motion very briefly is for notwithstanding the entry of the plea of the defendant of guilty to the first count and the specification for a judgment of acquittal on behalf of the defendant at this time.

JUDGE BETTIS: Aren't you premature on that until you rest?

MR. TINGLE: I don't believe so, Your Honor, at this point at the close of the State's case.

JUDGE BETTIS: Oh, okay, you can make it both times.

JUDGE HENDERSON: There is more than one charge here, Mr. Tingle, and are you asking for acquittal on all charges?

MR. TINGLE: Yes, Your Honor.

MR. SCOTT: May I address the Court?

[372.] JUDGE HENDERSON: Mr. Scott, do you wish to be heard?

MR. SCOTT: If it please the Court, we are not in a situation where this is a trial on the merits before this Court. We have a guilty plea here to the charge of Aggravated Murder and a guilty plea to specification one, I believe it was, and it seems to me that's the only charge where the Court is required to hear any evidence on the plea of guilty and the gun specification as to the first count. The plea of guilty to attempted Aggravated Murder and plea of guilty to that specification of that count does not require the presentation of any testimony to show a factual basis for that plea. So, therefore, the testimony that we presented directed itself solely to the first count and the specifications to the first count. I don't believe the State has the burden of proving beyond a reasonable doubt the same as if we were working on a not guilty plea. It seems to me we merely present sufficient evidence to this Court to find there's a factual basis to support each and every element of crime of Aggravated Murder and the necessary factual basis for the aggravating circumstances set out in the first specification . There's ample evidence in this case to show that this was a purposeful killing of Mrs. Stout when she's shot four times. there's ample evidence, which, if [373.] believed at this point, I think the Court at the conclusion of the State's case--I suppose that rule still applies, that you construe the evidence most favorably to the State at this point in time. There's ample evidence to conclude that this defendant fired all shots that hit anybody, because the same gun fired all of those shots. He has, by his own admission, had this chrome colored gun in his hand at the time that he fired the shots into

Mr. Stout. Mr. Stout identified the gun as the chrome colored gun. The ballistics people said it was not the black gun. The black gun, however, was fired in that house because the bullet came out of the mattress from that gun. There are no other bullets that match that gun. All the rest of them came from a different gun consistent with the Raven. The only evidence in this case that the gun ever left this defendant's hands, that is, the Raven, the missing Raven is his own statements which are in conflict. He has done his level best to get that gun out of his hand and has two or three different stories. You construe all that evidence favorably to the State. There was certainly completed in the course of an armed robbery, it was a purposeful killing of Mrs. Stout, obviously after he shot and believed he had killed Mr. Stout. The only plausible explanation for his then shooting and killing Mrs. Stout . The only plausible explanation for his then shooting and killing Mrs. Stout as she sat on the bed was to prevent apprehension for the [374.] crimes he had previously committed, being the armed robbery, and the attempted aggravated murder of Mr. Stout.

Therefore, I say the State has carried its burden of presenting this Court with credible evidence to show a factual basis for each and every element of the crime of Aggravated Murder and the aggravating circumstances set forth in the specification one.

JUDGE HENDERSON: Does the defense desire to be heard further on this question?

MR. TINGLE: Not on this question, Your Honor.

JUDGE HENDERSON: Your motion is overruled.

MR. TINGLE: At this time the defendant rests.

JUDGE HENDERSON: Are we ready then for--do you have another motion?

MR. TINGLE: Yes, Your Honor. At this time we would renew the motion previously made for a judgment of acquittal notwithstanding the entry of the pleas and also another companion motion to that that I would like to argue and present to the Court at this time.

JUDGE HENDERSON: Very well.

MR. TINGLE: Mr. Scott has indicated this hearing that we have been involved---

MR. SCOTT: Is there a motion to be heard before the argument is given? I mean, a motion to be presented?

MR. TINGLE: I have just started. I will get to that.

[375.] JUDGE HENDERSON: He has not made a motion yet.

MR. SCOTT: All right. I'm sorry. I didn't mean to interrupt.

MR. TINGLE: As a preliminary matter to that motion, Mr. Scott has indicated this hearing is to determine as to the first count and it's aggravated circumstances of the specification. The basis of the evidence to support the plea of the defendant. At this time on behalf of the defendant, we would move the Court to eliminate from the potential penalties available in this case the death penalty on the basis that the evidence as submitted is not sufficient under federal law as applied to the State of Ohio to sustain that potential penalty in this case. A conviction of aggravated murder can be obtained without the possibility of a death penalty if the specification is not included. Therefore, by logic the only

way that a death penalty can be arrived at as a potential penalty is by the inclusion of a specification of aggravating circumstances. The specification in this case requires that proof be submitted to this Court that John Stumpf purposely caused the death of Mary Jane Stout to escape detection, apprehension or punishment for the robbery and for the attempted killing of Norman Stout. Now, it is obvious that you must have specifically intended the death of Mary Jane Stout in order to sustain a conviction of that [376.] offense, which would then in fact authorize the death penalty as a potential penalty in this case. A review of the evidence indicates that there is no direct evidence to support that contention.

The testimony of Chris Stout did not offer any direct evidence on that question. The testimony of Dr. Larrick did not offer any. The testimony of Dr. Arejola, Sgt. Warner, Sgt. McCauley and Detective Simms offered no direct evidence of that. Lt. VanHorn's testimony offered no direct evidence of that except for the statements he obtained from the defendant himself. Those statements indicate that Mr. Wesley is the one who shot Mary Jane Stout. The testimony of Norman Edmonds contains no information and no direct evidence as to the conduct of any of the individuals within the Stout residence. The testimony of Norman Stout contains no direct evidence as to the actual shooting of Mary Jane Stout and Mr. Dye from BCI offered no direct evidence of the shooting of Mary Jane Stout by this defendant.

Now, based upon the evidence and taking all of the evidence there is no direct evidence of that fact. The State's case is composed of circumstantial evidence through the analysis of bullets, through the speculation as to a gun which has not been analyzed or presented in evidence and even assuming in taking the admonition this Court would [377.] give to the jury on circumstantial evidence, that evidence is not sufficient but--and it is a distinction that we have strongly

urged to the Court that we are not arguing more than the question that the death penalty as a potential penalty is not authorized in this case. That is the urging that we are taking at this point. Now, if we are to assume that the Raven pistol which has been testified to concerning this case was and if we are to assume that it is proved that this was the murder weapon, then assuming that we are being asked to assume in addition to that that this defendant fired that Raven pistol into Mary Jane Stout. We're taking two assumptions to get to that point. Clearly to base a decision of intent on an inference on an inference is not authorized.

Now, implied within the State's case are the aider and abettor statutes and complicitor statutes, but in 1982 following the direction indicated by the United States Supreme Court in Lockett, which was a clear direction not only as to what must be considered in mitigation but a clear direction as to what evidence was necessary to sustain a conviction where a death penalty was authorized. In 1982 the court decided Edmonds versus Florida. That case in quoting from some of the language of that case, it involved a Florida crime in which an instruction had been given that in order to sustain a [378.] conviction of first degree murder while engaging in the perpetration of or the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery and attempted robbery in that the unlawful killing occurred in the perpetration of or the attempted perpetration of robbery. That was the instruction Florida relied upon. In other words, the felony murder. A conviction was obtained. A death sentence was imposed upon a person who was not actually the person who fired that gun. Now, the Florida Court explained that the interaction of the felony murder rule and the laws of principle combined to make a felony generally responsible for the lethal action of his co-felon. The holding in Edmonds clearly and unequivocally disagrees

with that position. The Court stated that we have concluded the imposition of the death penalty in these circumstances is inconsistent with the 8th and 14th Amendments. The Court analyzed the death penalties across the United States in the 50 states finding of the 36 states authorizing the death penalty eight authorized death and felony murder situations. Four of the states found that felony murders were not capital offenses and eleven required some culpable mental state as a prerequisite as a conviction where the death penalty [379.] is authorized. Of these eleven, eight make knowing, purposeful or intentional premeditated killing of the captor. Ohio is found within that group of eight. As noted by the Court at page 1147. Now, an accomplice is not guilty of capital murder unless she intended to kill and that is the language cited by the Court in its note.

Clearly the United States Supreme Court will not approve a sentence of death when there is no direct evidence that the defendant actually fired the fatal shot and just as clearly the prosecutor has established a robbery, a non-fatal shooting, but from that point he is basing his specification to Count one on circumstantial evidence.

Therefore, it is our position and we move the Court that the death penalty in this case be determined to be not available as a potential penalty in this case.

If the Court please, I do have copies of the Edmonds decision for the Court's review.

JUDGE HENDERSON: Mr. Scott?

MR. SCOTT: I'd like to address Mr. Tingle addressed certain things here. I'd take them one at a time.

As a purpose to kill, whoever shot Mrs. Stout didn't intend to do her any favors when he shot her four times. It

seems to me that shooting a person four times shows what your intent was. So, I think their arguing there was [380.] no purpose to kill Mrs. Stout is ridiculous. Now, this specification one is not the felony murder rule. This specification deals with a killing in order to escape detection, arrest, apprehension, etc. of a previously committed offense. The felony murder rule in Ohio as a matter of the death penalty is set out in subsection seven, which requires that the person committing those named offenses be the principal offender or that the killing be with prior calculation and design. That is the felony murder rule and Ohio has put that language in to comply with Lockett and this other case. This specification one is not the felony murder rule. This is a specification of an aggravating circumstance wherein a person commits a felony, aggravated robbery or attempted aggravated murder and then the killing of the other person, here, Mary Jane Stout, was committed to avoid apprehension, detection, arrest, prosecution. This is not a felony murder case other than the principal charge itself, that the purposeful killing resulted during the commission of the aggravated robbery but as to the aggravating or death penalty specification this is not a felony murder case. That falls under sub-paragraph seven, which says the offenses committed while the offender was attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, etc. and was the principal offender or if not the [381.] principal offender, committed the aggravated murder with prior calculation and design. That's Ohio's felony murder specification. That is not what we are dealing with and that is not what this defendant has entered a plea of guilt to. Aside from that--so my position is we need not prove that this defendant was the principal offender for that specification one to be applicable, if proven. But, be that as it may, there is ample evidence--I know of no rule ever, anywhere in any court that says circumstantial evidence may not properly be considered in a capital murder case. Mr. Tingle says there's no direct evidence. There is direct

evidence that this man had a chrome colored Raven automatic in his position when he left the vehicle, by his own admission in one of his statements. He did his best to get that gun out of his hands in later statements. There is ample testimony from Mr. Stout that he had a chrome colored automatic pistol in his hand when he shot him between the eyes. There is expert testimony that the same bullets, the bullets that entered the head of Norman Stout were fired from the same gun as the bullets that entered the body of Mary Jane Stout. So, there's ample testimony here from which this Court may make a reasonable inference that the same person fired those things, particularly considered the testimony of Mr. Stout that at first recollection after [382.] he went down and after being shot was two person were talking and then the shots were fired. If you look at the defendant's statement he says I was in a state of shock, I left the area, went downstairs. I didn't even hear any shots. There wasn't sufficient time for two people to be talking. He said it was less than a minute and then to go downstairs? You have to believe without qualification one of the versions given by this defendant to get that gun out of his hand. This court as the trier of fact is the one to determine what testimony to believe and which not, but one thing that concerned me we're not here arguing, that the State has proved this case beyond a reasonable doubt. Is there a factual basis for the charge of aggravated murder as set forth in count one of the Indictment and is there a factual basis on the evidence to say that the facts required in specification one have been proven? I say there is. What other possible reason a defenseless lady sitting on her bed in a bedroom for somebody to shoot her four times other than the most logical and obvious explanation, that they thought they had already killed Mr. Stout in the process of an armed robbery, therefore they leave no survivors who can identify them. As a matter of fact, his first statement given to VanHorn he was under the mistaken belief there were no survivors, so he denied even being in the place. After he [383.] found out there was a survivor who

could possibly identify him the story changed a little bit more. Then, finally he does his level best to get that gun out of his hand because he said he had the black gun in his hand. In the third statement that he gave VanHorn the summary, he had the black gun in his hand during the entire sequence of events, when we know that could not possibly be true because he admits shooting Mr. Stout and the black gun did not shoot Mr. Stout. So, I say to you, yes, the State has carried the burden at least of showing a factual basis that the crime of aggravated murder was committed and the factual basis for the aggravated circumstance that it was committed to avoid detection, arrest, etc. for the previously felonies of aggravated robbery and attempted aggravated murder and that is not the felony murder rule nor the problem addressed by Lockett or this Florida case. Ohio has addressed that problem in sub-paragraph seven by saying if you're going under the felony murder rule you've got to prove he's the principal offender or that killing, the aggravated murder, was with prior calculation and design.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Briefly, Your Honor. Mr. Scott has indicated, and I don't want to belabor the point or the evidence, but I think it is significant to note that we are [384.] arguing the evidence at this point, or Mr. Scott is.

What my statement concerning circumstantial evidence and Mr. Scott said you would have to believe the defendant's statement without qualification and basically and very definitely the instruction concerning circumstantial evidence goes to the heart of that point. Circumstantial evidence can justify finding only if the circumstances are entirely consistent with the defendant's guilt and wholly inconsistent with any reasonable theory.

Mr. Scott has indicated you would have to believe without qualification what is contained in the defendant's statement. That is consistent with the theory of innocence but as I indicated previously, it is entirely possible for this Court to make its finding that the State has sustained a burden as far as the first count of the Indictment is concerned, but without proceeding to a mitigation stage simply by finding that in this case because of the evidence the state of the evidence, the death penalty is not authorized under Edmonds and that is our position. Thank you. If the Court please, I do have copies of that to submit.

JUDGE HENDERSON: The motion of the defendant is overruled and denied. I believe then that all evidence has been introduced. I would suppose that there is no rebuttal evidence, is there, Mr. Scott?

[385.] MR. SCOTT: There's nothing to rebut, Your Honor.

JUDGE HENDERSON: Then it would be next in order that the Court would hear the argument of counsel on this phase of the trial. Do you desire to have time?

MR. SCOTT: Your Honor, I'd waive further--I feel like I've given you my best shot what I think the evidence has proven and where we stand as far as the State sustaining the burden, as I understand it to be. There's a factual basis from the evidence that the crime of aggravated murder was committed to the extent that the guilty plea should be accepted and the finding of guilt entered and that the facts alleged in the specification to which the plea of guilty was entered have likewise been proved. I would waive further argument.

JUDGE HENDERSON: I'm going to---

MR. SCOTT: Reserving the right of rebuttal.

JUDGE HENDERSON: I'm going to ask the defendant if he desires to make a closing statement, a closing argument and possibly, Mr. Scott, depending upon his answer you may wish to reconsider your waiver.

MR. TINGLE: We have nothing further at this time, Your Honor.

JUDGE HENDERSON: You have no argument?

MR. TINGLE: No.

JUDGE HENDERSON: And you have no argument?

[386.] MR. SCOTT: I've waived further argument, Your Honor.

JUDGE HENDERSON: Very well. Then the Court is going to take this evidence under advisement and will announce its decision and would like to speak with counsel here at the bench.

(Whereupon, counsel for the respective parties approached the bench, and conferred with the Court out of the hearing of the Court Reporter.)

(Whereupon, counsel returned to their trial tables, and the following proceedings were had before the Court.)

JUDGE HENDERSON: We stand adjourned for today and this Court will reconvene at 1:00 o'clock tomorrow afternoon.

(Whereupon, at 3:33 o'clock p.m. Court recessed to reconvene at 1:00 o'clock, September 20, 1984.)

[387.] (Whereupon, at 1:08 o'clock p.m. September 20, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: This is case number 9684. The title of the case is The State of Ohio versus John David Stumpf. I'm John F. Henderson, Guernsey County, and sitting with me on my right is Judge Bettis from Columbiana County and Judge Rice from Tuscarawas County. Judge Bettis and Judge Rice are sitting by designation of the Supreme Court in thise case, a three Judge panel.

Counsel present for the State of Ohio, Mr. Keith Plummer, Assistant Prosecuting Attorney and Mr. James Scott, Prosecuting Attorney of Guernsey County, Ohio. The defendant is present in court together with his attorneys. The attorneys are Mr. Lew Tingle and Mr. Craig Stephans of Ravens and Portgage County. Mr. Tingle from Guernsey County.

This trial began on Monday of this week and has been continued each day since. And on yesterday the parties rested and the Court thereupon considered the evidence as it had been presented.

By way of review, I would say that on Monday of this week the defendant withdrew his plea of not guilty to the first count and to the first specification as amended [388.] of the first count and the fourth specification and withdrew his plea of not guilty to the second count and to the specification thereof and did then in open court enter a plea of guilty to those counts and to the specifications named.

The Court has considered the evidence and has reduced its decision to writing, which I will now read into the record.

This matter came on for hearing in accordance with section 2945.06 of the Revised Code of Ohio. The defendant heretofore having waived a trial by jury and having requested a trial to a panel of three Judges, thereafter the defendant entered a plea of guilty to Count one of the Indictment and specification one, as amended to Count one and specification four to count one. The defendant further entered a plea of guilty to Count two of the Indictment and specification of Count two.

The Court, in accordance with Section 2945.06 of the Revised Code of Ohio, heard the testimony of the witnesses and determined that the defendant is guilty beyond a reasonable doubt as charged in Count one of the Indictment and is guilty beyond a reasonable doubt of specification one, as amended, to Count one and specification four in Count one.

The Court further determines that the defendant is [389.] guilty beyond a reasonable doubt as charged in Count two of the Indictment and guilty beyond a reasonable doubt of the specification of Court two, as set forth in the Indictment.

That is the decision of the Judges. They have signed this Judgment Entry, each one of them and it is the combined decision of the Court.

Mr. Scott, do you wish to be heard at this time?

MR. SCOTT: If it please the Court, at the time the pleas of guilty were entered, the State at that time moved for leave to nolle pros the remaining matters in the Indictment and that motion was taken under advisement or deferred at that time. At this time, then, the State would renew the motion to enter a nolle pros as to specification and three to the first count and a nolle pros to the third count and the

specification to the third count and a nolle pros to the fourth count and fifth count in the Indictment.

JUDGE HENDERSON: Mr. Scott, you then are seeking to nolle all matters in an Indictment other than those upon which the Court has now ruled, is that correct?

MR. SCOTT: That is correct, Your Honor.

JUDGE HENDERSON: Does the defense care to comment or to object to the motion that he has been made?

MR. STEPHENS: No, Your Honor.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO

APPELLEE,

vs.

JOHN DAVID STUMPF

APPELLANT.

Transcript of the Proceedings held on September 17, 18, 19, 20, 21, and 24, 1984 before the Honorable Judges John E. Henderson, J. Warren Bettis and Raymond Rice.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

LEWIS M. TINGLE
CRAIG M. STEPHENS
Attorneys at Law
138 N. 7th St.
Cambridge, OH

For the Appellant.

FILED COMMON PLEAS COURT
1984 DEC-3 AM 8:47
[illegible]
CLERK OF COURTS
GUERNSEY COUNTY

* * *

[514.] matter of presenting final argument of counsel and the Court is aware that occasionally as you finish the presentation of evidence that there needs to be just a few moments in order to collect your thoughts before you present your final argument and at this time the Court will stand in recess for ten minutes.

(Whereupon, a short recess was had.)

(Whereupon, the following proceedings were had before the Court.)

JUDGE HENDERSON: Mr. Tingle, are you ready to present the argument on behalf of the defendant?

MR. TINGLE: Yes, Your Honor.

JUDGE HENDERSON: All right. Proceed then.

MR. TINGLE: If it please the Court, Mr. Scott and Mr. Plummer, at this juncture of this proceeding we are in a unique situation. That situation of not arguing the guilt or innocence of an individual but only the statutory specifications or requirements, the mitigating factors and the aggravating circumstances. The end result of that being the determination of a penalty appropriate to this defendant. As I stead, the question is no longer guilt or innocence. John Stumpf has admitted his guilt to this Court and the Court has so found it. The basic question [515.] is that of establishment

of the mitigating factors as provided by the statute and whether or not they are outweighed by evidence presented by the Prosecuting Attorney beyond a reasonable doubt, if they outweigh those mitigating factors. And it is in that context that my comments will be made and only in that context as it relates to the actual guilt of the defendant but only as it relates to the appropriate penalty.

2929.04 provides for a list of mitigating factors that are available for the Court's consideration. One of those factors is that whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation. Obviously in this case we have not had the dictionary definition of duress, coercion or strong provocation. But, we have had evidence of influence, of the character of the defendant and I think a closer look at the character of the defendant reveals that his conduct is not in his character as has been shown by the witnesses who have t testified here. It has show that John Stumpf is a person who is easily influenced. He's not a leader. He's a follower. And one of the leaders that he has had during his life has been Clyde Daniel Wesley. As indicated from one of the items submitted here today by the State, a previous problem with that this defendant encountered with [516.] the legal system was in conjunction with Clyde Daniel Wesley.

The other evidence available in this regard is John's handling of intoxicating beverages as one witness testified two beers and he was looped. Yet on that occasion on May 14th we had a car full of beer with three individuals who were drinking steadily throughout the day and John's influence or susceptibility to influence was much greater at that point then it would have been at any other time.

We have evidence of the violent character and nature of Clyde Daniel Wesley, which is in stark contrast to the

testimony that we heard concerning the character of John Stumpf. The prior senseless shooting on Route 40 in Belmont County by Clyde Daniel Wesley in which there is nothing to infer that John Stumpf intended that or concurred in it in any respect.

The evidence that John has offered you that he was afraid of Clyde Daniel Wesley; the evidence that was offered from a number of witnesses who took that stand as to John's feelings toward women, his respect for them, his willingness to help them, that he truly did respect women; the conduct for which he is before the Court is totally out of character for him.

Another factor to be considered by the Court is the youth of the offender. John was 23 years old at the time [516.A.] of this offense as stated by his mother. His mental capacity was somewhat limited as testified, going back to his grade school days at which he worked and there was no indication that he was not wiling to do the work, but the results just weren't there. He could try as hard as he might, but the results were never achieved. And it's not just the chronological age of the defendant that's to be considered. It's the youth of the defendant, his emotional age as well as chronological age. I think there is no question that John's emotional background is limited and very limited at that, as indicated by his teacher, by everyone who took that stand.

Again, John wasn't the leader. John was the one back in the crowd. John was the follower. It wasn't in his character to take the initiative in something like this. That is a factor that the statute provides for this Court's consideration. It's a factor that has been established.

John lived at home, never married, he had no children. The immaturity is apparent from the evidence that this Court has heard.

Another factor is the offender's lack of significant history of prior criminal conduct or criminal convictions and delinquency adjudications. There is no evidence of his delinquency adjudications offered in the presentence [517.] report. You have evidence of DWI conviction. We have evidence of a theft offense and disorderly conduct, as submitted here today. But the statute doesn't just say criminal convictions, it says the lact of significant history of prior criminal convictions. The items that have been submitted to the Court don't constititutes a significant history of criminal convictions. This is not an individual who has been convicted of a series of armed robberies, a series of breaking and enterings, a series of violent offenses. Obviously he does have something on his record, but they are not of the significant nature the statute looks to.

It is also interesting to note that the death offense, as indicated to the Court, was again in the presence of and for the benefit of Clyde Daniel Wesley.

Another factor is that the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.

Now, again, I must stress to the Court that I am making these comments only in the context of a mitigation hearing and mitigating factors. You look at the evidence before the court, which the State offered the statements of the defendant. We look at the statement made to this [518.] Court today by the defendant John Stumpf. They indicate to this Court that he was not the principal in the offense. He was not the principal in the acts that led to the death of the victim. The evidence indicates, as John told you here today and consistent with his statement of May 22, 1984, that it

was in joining Clyde Daniel Wesley and Mr. Edmonds in their vehicle and traveling down the road and drinking that John Stumpf saw Clyde Daniel Wesley shoot another individual; that they stopped at the house or along the road at the suggestion of one of those individuals; that they went to the house at the suggestion of Clyde Daniel Wesley; that the gun was produced from Clyde Daniel Wesley and it's significant to note that the guns involved in this case that came from that vehicle whether they were used in this offense or the one in Belmont County were guns brought to this area by those two individuals, Clyde Daniel Wesley and Norman Edmonds; that upon reaching the house John's statement to you is consistent with the evidence again, that upon entering the house a robbery did take place; that Clyde Daniel Wesley was moving through the house obtaining the various items that were to be taken; that John's participation at that point as in standing and watching and holding a gun at that point. Certainly he became nervous. There's no question about that and that is consistent with Norman [519.] Stout's testimony. He was nervous. The pull man throughout that whole thing was Clyde Daniel Wesley who knew what he wanted and how he was going to do it. Upon Norman Stout's move from the bed and consistent with the evidence this Court has heard, John reacted in panic and fired a shot and John has admitted that to this Court and in his statements. Contrary to what Mr. Stout believes, I think the evidence, the physical evidence, the testimonial evidence in this court supports without question the fact that that first shot that hit Mr. Stout did not occur to the area of his glasses and the nasal area, as testified. It is entirely inconsistent with the fact that the first shot hit Mr. Stout as he came up off the bed and lunged toward John Stumpf. He was hit in the vertex at that time from traveling low from the bed to the point where he encountered the defendant. Going to the other room where he encountered Clyde Daniel Wesley and the altercation in that room the blood on the walls, the glasses on the floor in that room, the bullet fragment in that room are

consistent with the fact that Norman Stout was actually shot in the nasal area in bedroom number one. Consistent, also, is the fact that John Stumpf stated that he was scared at that point. He knew there was a problem. He knew he was in trouble. He knew that and he didn't want any further part of the situation. He left the house. He [520.] went downstairs. He went out of the house and had to be called back by Clyde Daniel Wesley to get him to drive the car. Again, Clyde Daniel Wesley using John Stumpf to drive the vehicle. It is at this point that Norman Stout was shot the second time in bedroom number one. John Stumpf is gone. The guns had fallen to the floor, been knocked from the hands, had been picked up and retrieved by John Stumpf and that gun fired and it fired at Norman Stout, but it's also as equally obvious that the only way that the bullet hold came into the mattress in that room is at that point Norman Stout was shot by John Stumpf the second time. The bullet entered the mattress and it remained there where it was recovered by the Guernsey county Sheriff's Department. If the State believes that the fragments of bullets are inconsistent with the way this happened as I've stated it, it must also then explain nine bullets and eight casings because that's what it would entail. The fragment of the bullet found in bedroom number one is the fragment that did the damage to Mr. Stout in the nasal area. That is consistent with the eight casings found, not with nine shots being fired. Upon leaving the house John Stumpf went outside, was called back and drove the vehicle away. The only one left in that house when he left was Norman Stout laying on the floor, was Mrs. Stout still in the bedroom number two and Clyde Daniel [521.] Wesley who had at that time after John had picked up the gun from the floor in bedroom number one, the Chrome plated Raven. John indicated this information in his statement of May 22. He has also stated it here today. It is consistent with the physical evidence and the testimony the State has offered, but once again I am stressing very strongly that his is offered in the context of this mitigation hearing.

Now, other factors that bear upon that point of whether or not this defendant is the principal offender in that or the principal in the acts that led to the death of the victim. The State of Ohio nolled as part of our situation here in our entry of a plea and we are only dealing with one of the specifications that is before the Court. The specifications nolled that are no longer before the Court was that John was the principal offender in the commission of the offense of Aggravated Murder of Mary Jane Stout. That specification is no longer before the Court. The evidence is absolutely consistent with the fat that Clyde Daniel Wesley is the one person who shot Mary John Stout on that occasion. There are other factors that are relevant to the issue of whether the offender should be sentenced to death. The statute speaks of those and it does leave it somewhat open ended, but they are factors that the Court can consider. Anything that may be [522.] relevant to it. Relevant to the Court's consideration also are the fact that Clyde Daniel Wesley has also been accused of being the principal in this case. The Indictment that is before the Court in evidence. Also relevant is the fact that we heard the testimony of Norman Edmonds in this court who, by his testimony before this Court, it is apparent that he is a co-participant in an Aggravated Murder, Aggravated Robbery and a theft, but a factor to be considered in mitigation at this point is the sentence agreed upon in which in all likelihood that individual will receive a 7 to 25 sentence concurrent with the sentence received for his felonious action in Muskingum County.

Now, even accepting the State's argument that John Stumpf is the principal offender in this crime, it does not foreclose the Court from considering all of these factors. As I have stated, John Stumpf has admitted guilt of the crimes as charged in the Indictment under the first count, but in considering the evidence for mitigation purposes we believe that the burden of proof imposed upon us which can be stated

to be a preponderance has been sustained. The aggravating circumstances--and again referring back only to the specification to which the defendant entered his plea, the aggravating circumstances have not been proved beyond a reasonable doubt to [523.] outweigh those mitigating factors. It is with that in mind that we believe the death sentence in this case is not an appropriate penalty. We believe the appropriate penalty in this case to be a sentence of life in prison for the crime that was committed for which John Stumpf has entered a plea of guilty with no parole possibility for twenty full years plus a sentence on the specification charging a weapon having been involved for an additional three years, plus a sentence on the attempted aggravated murder of seven to twenty-five years. Thank you.

JUDGE HENDERSON: Mr. Scott, proceed.

MR. SCOTT: If it please the Court and counsel---

JUDGE HENDERSON: I would note for everyone's information that Mr. Tingle, his presentation, was for twenty minutes. That's not binding upon anybody, but I thought you might like to know.

MR. SCOTT: If it please the Court, the only question at this point in this trial or in this proceedings which is before this Court is whether or not the defendant has in fact proved the existence of any mitigating factors as set forth in Ohio Revised Code Section 2929.04, and if so, whether or not those mitigating factors as so presented and proved outweigh the aggravating circumstances which this Court has found proven beyond a reasonable doubt as set forth in the first specification as amended [524] to the first count. The amended /first specification to the first count in order to keep things in clear focus reads as follows: The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04(A)(3) and in compliance with Ohio Revised Code

Section 2941.14 that the aforesaid offense, that is, the aggravated murder of Mary Jane Stout was committed for the purpose of escaping detection, apprehension, trial or punishment for other offenses committed by the above named John David Stumpf, to wit: Aggravated Robbery and Attempted Aggravated Murders, being the attempted aggravated murder of Norman Stout and to which the defendant has entered his plea of guilty. That is the actual precise issue before the Court at this stage of these proceedings. I don't propose to review the evidence in any great detail. This Court heard the evidence, has considered the evidence and has already rendered its decision as to whether the evidence proves the charge of aggravated murder beyond a reasonable doubt and proves the first amended specification to the first count.

I would simply comment that this defendant and his co-perpetrator, Mr. Wesley, chose the Stout residence at random, having no prior connection with the Stouts. No other reason to choose that residence other than happen to be there and they happened to notice it. It appeared [525.] convenient and it appeared vulnerable, obviously, begin somewhat isolated from other residences and being close to the interstate. As to what they their purpose was in going to that house, the only stated purpose was to use the telephone but one way or the other, if you believe the defendant's unsworn statement that he was handed this chrome colored gun by Wesley, nevertheless the two of them went to that house armed with loaded 25 caliber automatic pistols. I don't know that it's necessary for two people to go armed to use the telephone. Thereafter, they approached the house and were admitted on the subterfuge that they were having car trouble and needed to use the telephone. They did enter. According to Norman Stout--the question has been raised who's the leader and who's the follower. According to Mr. Stout, this defendant, Mr. Stumpf, did most of the talking as to what their problem was, what they wanted to do, he's the

one that used the telephone, which is contrary to the unsworn statement of the defendant. The defendant after he used the telephone or purported to use the phone, whichever, the case may be, wiped the receiver clean, which is something unusual and for a particular purpose, obviously, eliminating any fingerprints. It seems to me that all of these actions of the defendant speak louder than anything he can say in an unsworn statement or any [526.] of the statements in evidence as to what their purpose was in going to the Stout residence that night.

As to their actions inside the house, I think Mr. Stout testified that they seemed to work as a well coordinated team. there was no stumbling around or delay, I think was his testimony, was to the effect that at no time were we left unguarded, did we have any opportunity to do anything to extricate themselves from the situation they were in, which leads to the inference that perhaps this is not the first time that they had done these things as a team. To say then, it was very clear what their purpose was.

As to the shooting itself, Mr. Tingle gave a very nice narrative story, but the Court has heard the evidence and a lot of those things are pure speculation on his part. Mr. Stout, himself, testified he got shot between the eyes the first time; that he was standing erect with his head up and not with his head down. The doctor described the bullet as entering somewhere in the very top of the head, which would be difficult to do if a man is standing erect facing you. Obviously after the first shot was received at some later time the defendant shot him again in the head. Mr. Stout testified that there was no altercation to the point that the defendant was knocked from his feet or the gun was knocked from this hands. He [527.] did not even see Wesley prior to losing consciousness after he was wounded.

As to the defendant's story that he became remorseful which I would submit is rather late in the sequence of events, after he shot Mr. Stout and left the scene, the immediate area there and therefore he did not have anything to do with the killing of Mary Jane Stout, this is inconsistent with the evidence that Mr. Stout heard two male voices talking in a normal tone of voice and in a normal volume and after hearing that conversation between two people I think he described within a minute or less than a minute he heard the four reports that he now believes, and correctly so I submit, to be four gunshots that killed his wife. The only--what reason--the specification alludes to the reason for the killing of Mary Jane Stout being to escape detection and so forth for the previously committed offenses of aggravated robbery and the attempted aggravated murder of Norman Stout.

Let's stop the sequence of events following the shooting and disabling of Norman Stout. What was their situation at that time? We have two young early twenties individuals armed--each armed with a loaded handgun facing a fifty-four year old female person who had been suffering from, I believe they said, influenza, at least she was not in robust health at the moment sitting on a bed in her [528.] bedroom. What possible reason did they have for needing to kill Mary Jane Stout, given those circumstances. Recall, if you will, the testimony of Lt. VanHorn that this defendant was under the mistaken belief at the time he first talked to him in Cannonsburg, Pennsylvania on the 21st day of May at which time he gave his first statement that at that time this defendant was laboring under the misconception that both Mr. and Mrs. Stout were dead. Given that misconception on his part, he gave a statement at that time that he didn't even enter the house. The point of it is that at that moment after Mr. Stout fell--after receiving the second shot, Mr. Stumpf thought he had committed a murder. What other possible, earthly possible explanation for shooting a helpless defenseless lady sitting on a bed in her bedroom four times

other than leave no survivors to identify us. What other possible explanation is there for that merciless, brutal, cold blooded, whatever you want to call it, killing of that fifty-four year old lady as she sat on her bed? Were they fearful she would subdue them with their guns, spotting them some thirty years in age. I think not. The only reasonable possible explanation is to leave no survivors for what we've done, which they believed to be a murder.

So, I would say to your that the aggravating circumstances are glaringly apparent and this Court has [529.] so found in finding the defendant guilty of that amended first specification.

Now then, what mitigating factors have we heard from the defense presentation as set forth in 2929.04 of the Code? Now, I'd like to review briefly, if I might. Whether the victim of the offense induced or facilitated it. I would say that Mary Jane Stout, the only thing she did to facilitate her own death was to become in the line of fire of the bullets fired by this defendant. Unlikely that the offense would have been committed, but for the fact the defendant was under duress, coercion, or strong provocation. The only evidence that this defendant was other than cold and calculating at the time of that killing was his own unsworn statement. What duress was he under? What coercion? The defense would attempt to lead this Court to believe that Wesley had some mystical hold over John David Stumpf, could lead him by the nose to do things that he just wouldn't do otherwise. I don't think there's evidence in this record that supports that. If in fact the defense is arguing that Wesley is the big bad guy because of what happened in Belmont county, then John David Stumpf full well knew at the time that he got out of that car with that gun in his pocket or when he accepted it from Wesley, whichever, to go to the Stout residence that Wesley was a big bad guy and he went along [530.] anyway. There's no evidence of any sort that Wesley turned a gun on

him and said you've got to go, Johnny. I submit to you with that knowledge, voluntarily going to that house armed and sort of leading the proceedings, if you will, at least according to Mr. Stout that he was the one who talked to him initially and asked to use the phone and he also was the one who kept turning to the other who Mr. Stout cannot identify and say, are you ready, are you ready, several times. Is that a leader or is that a follower? They talk about his I.Q., his ability to complete his education. I know of nothing in these mitigating factors as spelled out here that says a person has to be of a certain I.Q. or have completed a certain grade in school with a certain grade point hour to be amendable to the death penalty. In fact, what he says, the offender because of mental disease or defect lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. There's absolutely no evidence whatsoever in this record that that subparagraph applies to this defendant. The next being the youth of the offender. The evidence is, and we aren't disputing that fact, that the defendant was twenty-three years of age at the time he killed Mary Jane Stout. Again, it is a factor to be considered, but is it a weighty factor to the point that the Court can say [531.]that in and of itself coupled with, if you will, the question whether or not there is a significant criminal history outweighs the circumstances proved by the evidence in support of the aggravating circumstances set forth in the amended first specification. I don't believe any reasonable person or that justice can conclude or that justice requires the conclusion that a twenty-three year old person is entitled to commit an aggravated murder under any circumstances, however brutal, however cold blooded and calculatingly it was done and should the first time escape the death penalty. I believe a twenty-three year old individual with the criminal history of this defendant, which is not unblemished record by the way, it is a question for this Court to determine whether or not he has a--there is a, quote, lack of significant criminal history. I submit to you that the

criminal history presented is such that this defendant age twenty-three, if you will, with his history under the circumstances of this case where they invaded the privacy and sanctity of a private home selected at random which could have been anyone whose home seemed to be vulnerable for their purposes methodically, if you will, after having shot Norman Stout in order to get away, if you will, killed Mary Jane Stout is amenable to the death penalty regardless of his age of twenty-three. As to whether or not the [532.] defendant is the principal offender, I don't believe it is necessary for this Court to conclude that he was the principal offender, that is, the actual shooter. I think there is ample evidence--I'm not conceding that at all. I think there's ample evidence in this record that this defendant fired the four shots into the body of Mary Jane Stout. His story does not wash. You take the three versions, the first version he thought no one could identify anybody because both of the Stouts were dead, so he didn't even admit going into the house. The second version after he found out Norman Stout was still alive and could probably or possibly identify him he changed his story to admit that part which he through Norman Stout could point the finger to him, but did his level best to get the chrom colored gun out of his hand by saying there was an altercation with Norman Stout. Five foot six or so and this defendant thirty years younger and somewhat bigger and the third person we believe was Wesley who was described as similar in build to this defendant, Norman Stout shot between the eyes was still able to knock down this defendant and Wesley and gravel around on the floor with the guns rolling around to the point where this defendant grabbed another gun, the back gun he would have you believe, but he said I shot him again. But the ballistics man says both bullets that entered the head of [533.] Norman Stout came from the same gun and was not the black gun so that doesn't wash, but he did his level best to get that gun out of his hand before the shooting of Mary Jane Stout. Said he walked away. There wasn't enough time for two people

were talking that Norman heard and the four shots were fired to get down to the basement as he would have the Court believe and then it is his--in that second statement he would have you believe he said he didn't even hear any gunshots, that he was down in the basement. But in that statement, I believe contrary to what he said in his unsworn statement today, if I'm not mistaken in that second statement he said Wesley after we got in the car, Wesley wanted his black gun back because he had it awhile it had some sentimental value, something to that effect. So they traded the guns back after the shooting and then he pitched the chrome colored gun. that was his second statement. His third statement which I believe was the maybe the 15th of May, yes, State's Exhibit "II-2" which is a summary from Lt. VanHorn of the verbal statement in that statement he said I never did have the chrome gun. I had it inially, but I found out I couldn't operate it, so I told Wesley I didn't know how to operate it so we traded guns. Throughout this whole sequence of events he has the black gun, which is impossible. He admittedly shot Norman Stout and [534.] the [black gun didn't shoot Norman Stout by the ballistics expert and also by Norman Stout, himself. He saw a chrome colored gun similar to the Raven we have in evidence as I think State's Exhibit "N-1". So, the bullets, all the bullets that hit anybody came from the other gun, not the black gun. so, there's ample, ample evidence in this record to make the reasonable inference that this defendant shot both those individuals. But, be that as it may, they both went in for the joint and common purpose of committing and armed robbery. They both actively participated in the events, sequence of events of that armed robbery. both weapons were fired in that house that night. The black gun fired once because it probably misfired thereafter, as evidenced by the bullet that was found in the mattress. Both shooters were trying to kill somebody. Given those circumstances, although we believe the evidence does prove that he was the shooter of Mary Jane Stout legally, technically, I don't believe it makes any difference when you

have two people acting in concert for the joint and unlawful purpose of committing an aggravated robbery and both are attempting to kill somebody with a firearm as a result of or during the course of that armed robbery they are both amenable to the death penalty under that amended specification in my judgment.

I don't wish to belabor the matters further. There [535.] are--Mr. Tingle talks about other mitigating factors. Well, let me back up a moment. The only evidence to support some of the things Mr. Tingle would have you accept as the gospel truth is the unsworn statement of the defendant given here this morning, which is his right to do, but I ask you why the unsworn statement rather than being sworn to testify as every other witness? To avoid cross-examination. I had quite a few questions I would have liked to ask Mr. Stumpf about some of these things he's saying in his statement and some of the things he's saying in his statement and some of the things he's saying now in his unsworn statement, assuming he would have testified under oath in a similar manner. Why did he elect not to submit himself to cross-examination? How much weight should this Court give the unsworn statement of the defendant which was not subjected to the test of cross-examination? The Court is weli able to consider that.in determining what credibility to give the unsworn statement of the defendant.

In summary or in conclusion, if you will, perhaps the defense has shown that this defendant is a youth that is the youth of the defendant was shown to be twenty-three years of age and that he does not have, as Mr. Tingle says, a string of armed robberies or other homicides. He has some record, whether that is a lack of significant criminal history or not to the point that it carries much weight [536.] one way or the other is for this Court to determine, but I submit to you that given the circumstances of this killing particularly as it relates to the factual allegations of the first specification as

amended to the first count of Aggravated Murder it falls far short of outweighing the brutality, the outrageous, if you will, conduct in the killing of Mary Jane Stout, a defenseless, helpless woman after her husband went down with two bullets in the sanctity of her own home sitting on a bed in her bedroom shot four times. I submit to you it falls far short of outweighing those circumstances as revealed by the evidence in which this Court has found beyond a reasonable doubt.

I submit to you the death penalty is the appropriate penalty in this case and the State urges this Court to so find and to so impose the death penalty. Thank you.

JUDGE HENDERSON: Mr. Tingle?

MR. TINGLE: Thank you, Your Honor. Very briefly. Anyone with any sensibility must agree that what occurred at the Stout residence that night was a horrible act. It involves a sense of outrage. There's no question concerning that and not amount of words can give the Stouts any understanding of why. Mr. Scott asked the question why, also, why the death of Mrs. Stout in that situation. We have only to look forty miles down the road in Belmont County, Ohio to get the answer to that and that's the [537.] unexplainable shooting of another individual for absolutely no reason at all at the hands of Clyde Daniel Wesley. It's not a sufficient answer. It's an answer to the question, why, and it's the character of Clyde Daniel Wesley. It is absolutely not the character of John David Stumpf, a person who's incapable of that kind of act. It is a factor to be considered by this Court in mitigating against the imposition of the death penalty. The death penalty is an absolute penalty that is not proper in any situation in which any individual is not absolutely responsible and it is our feeling that that individual who still sits in Texas is the one who shot Mary Jane Stout. Whether this was a joint effort or not the death penalty is available to this Court, whether it finds John

Stumpf to be the principal. Again, we're pointing only for purposes of mitigation. But once again, for such an absolute penalty it should be reserved for someone who's absolutely responsible and with that in mind we urge the Court to consider the penalty that I previously outlined to the Court of life imprisonment thank you.

JUDGE HENDERSON: Thank you gentlemen for your presentation. This trial has run its course. We have had the evidentiary hearing, concluded that and made our decision. We now have concluded the mitigating phase of the hearing and we are about to make our decision upon that. [538.] The Court is going to stand in recess and will advise counsel at the time that the Court will again reconvene.

JUDGE BETTIS: I want to make a statement in the record, if I may Judge.

JUDGE HENDERSON: Certainly. Absolutely. You too, Judge Rice.

JUDGE BETTIS: As the record has indicated, I am not a resident of this county, but I want the record to show that in my thirty plus years of experience both down on the floor and on the bench that I have very rarely witnessed the professional conduct of the lawyers in this case. It's a particular privilege to work with lawyers of this caliber, both for the State and for the defense. They have handled themselves in a professional manner. they have performed their duties as I understand the law to be, a search for the truth, and I appreciate the way they have handled this case. I want the record to so show.

JUDGE HENDERSON: Judge Rice, do you have something you wish to add?

JUDGE RICE: I would want to affirm what the Judge on the other end of this bench has just stated. But in addition I want to commend the Presiding Judge. I couldn't perform the job like he did and I probably had more experience as a Judge than what he has in a dignified--I [539.] want the right word here, precise manner presented the matters that have come before this Court and in the interest of justice. I think has performed a magnificent job. Thank you.

JUDGE HENDERSON: At this time I would simply say that I would add my words to the words of Judge Bettis and Judge Rich with regard to the professional manner in which counsel for both the State of Ohio and the defendant have presented their case. They've worked hard. They've spent hours, hours that those of you who are in this courtroom would not understand in the faithful performance of their duty. I want to take this opportunity to thank the Judges who sit to my left and to my right for their cooperation and their understanding and their invaluable assistance and we now stand in recess until the Court reconvenes later this date.

(Whereupon, at 11:30 o'clock a.m. Court recessed.)

(Whereupon, at 3:12 o'clock p.m. Court reconvened and the following proceedings were had before the Court.)

JUDGE HENDERSON: The Court has been involved in deliberations since leaving the courtroom this morning and you have been assembled here for the purpose of [540.] informing you of the progress of our deliberations. The deliberations are continuing. Decision has not been reached. This Court will reconvene at 10:00 o'clock a.m. Monday morning at which time we anticipate that the decision of the Court may be announced. I would ask at this time have counsel any questions? Mr. Scott?

MR. SCOTT: No, Your Honor.

MR. TINGLE: No, Your Honor.

JUDGE HENDERSON: Is there anything further? Then we stand adjourned until Monday morning.

(Whereupon, at 3:15 o'clock p.m. Court recessed to reconvene at 10:00 o'clock a.m. on September 24, 1984.)

[541.] (Whereupon, at 10:01 o'clock a.m., September 24, 1984, the following proceedings were had before the Court.)

JUDGE HENDERSON: This is case number 9684. The title of the case is State of Ohio versus John David Stumpf. The Judges of this Court, Judge Warren Bettis, Judge Raymond Rice and I'm John E. Henderson. Judge Bettis and Judge Rice have been assigned to this case by the Supreme Court of Ohio. It is a three Judge panel as provided by law. The Court notes that counsel for the State of Ohio is present in court and counsel for the defendant and the defendant is present in court. As indicated by the Court, this time has been set aside for the imposition of sentence as prescribed by law both as to count one and as to count two of the Indictment. I would ask at this time that the doors be secured and that no one be allowed to enter until the sentencing procedure is completed.

First as to Count 2 and the specification of the Count, Count 2 being the offense of Attempted Aggravated Murder, a felony of the first degree in violation of Section 2923.029(A) and the specification.

Has counsel for the State of Ohio anything that they desire to place in the record before sentence is [542.] pronounced on Count 2?

MR. SCOTT: No, Your Honor.

JUDGE HENDERSON: Has counsel for the defense anything they wish to place in the record before sentence is pronounced on Count 2?

MR. TINGLE: No, Your Honor.

JUDGE HENDERSON: Will counsel for the defense and the defendant please stand? John David Stumpf, do you wish to make a statement in your own behalf or present any information in mitigation of punishment?

THE DEFENDANT: (Defendant nodded in the negative.)

JUDGE HENDERSON: I note that you indicated by shaking in the negative to the question, is that correct counsel for the defendant?

MR. STEPHENS: That's correct, Your Honor.

JUDGE HENDERSON: The defendant having withdrawn his plea of not guilty to the Second count of the Indictment and to the specification and having entered his plea of guilty to said Count entitled Attempted Aggravated Murder in violation of Section 2923.02 (A), a felony in the first degree and to the firearms specification prescribed by Section 2929.71 to said Second Count and the Court having found the defendant to be guilty of said offenses and specifications, the Court hereby sentences the defendant to the Columbus Correctional Facility and there to serve [543.] an indeterminate sentence of not less than 7 years and not

more than 25 years. No fine is imposed against the defendant, but all costs are assessed against him for which execution is awarded.

In addition thereto for violation of the firearms specification you are sentenced to said facility for a mandatory period of 3 years, which said 3 years is, in accordance to law, is to be to be served prior to the sentence heretofore imposed for said Second Count.

The defendant and his counsel may be seated. Is there anything further, gentlemen of counsel, with regard to Count 2

MR. SCOTT: State has nothing, Your Honor.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: Now, as to Count 1 and specification 1, as amended, and specification 4. The Court at the conclusion of the hearing provided by Section 2929.03 (D) deliberated, prepared its separate Opinion, as provided by Section 292.03 (F), and does unanimously find that the aggravating circumstances of the defendant John David Stumpf was found guilty of committing outweighed the mitigating factors presented by the defendant at said hearing.

The Court will now state its separate Opinion. Pursuant to Section 2929.03 (F) of the Revised Code [544.] of Ohio, the Court being a panel of three Judges does hereby state in a separate Opinion as follows:

Existence of any mitigating factors set forth in division B of Section 2929.04.

The Court has considered in accordance with Revised Code of Ohio, Section 2929.04 the following mitigating factors:

1. The nature and circumstances of the offense.

2. The history, character and background of the offender, for which you may see Defendant's Mitigation Exhibit number "4".

We find that the defendant has established by a preponderance of the evidence the following mitigating factors:

1. The youth of the offender - age 23.

2. That although the defendant had been found guilty of certain offenses in his home community, the defendant lacked significant history of prior criminal conviction and delinquency adjudications.

We further find that the defendant has not established by a preponderance of the evidence mitigating facgtors 1, 2, 3 and 6 as set forth in Section 2929.04 (B).

Existence of any other mitigating factors.

The defendant presented the following factors which the Court has considered:

[545.]
Evidence of character.
Use of alcohol and drugs.
Employment history.
Emotional stability.
Family relationships.

Educational background and native intelligence, and you're referred to Defendant's Mitigation Exhibit number "3".

Unverified and unattested questionnaires on John David Stumpf. These are found in Defendant's Mitigation Exhibit number "6". The alleged preparer's name appears in response to question number 30.with no indication it is or is intended as a signature. The questionnaires were prepared by person or person unknown.

Summary results of questionnaires. These are contained in Defendant's Mitigation number "5".

And finally, leadership qualities.

Factors 1 through 9 were not established as mitigating factors by a preponderance of the evidence.

Aggravating circumstances the defendant was found guilty of committing.

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment of other offenses committed by the defendant, to wit: Aggravated Robbery and Attempted Aggravated Murder.

[546.] Reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors:

The Court finds beyond a reasonable doubt that the defendant was the principal offender in County One of the Indictment.

2. The methodical manner in which the defendant and his companion entered the house of the victims and assumed control of the victims. For example:

'Wiping of fingerprints from the telephone.

b. The dialogue of the defendant with his companion. For which you may see attached Transcript A.

c. The initiative taken by the defendant in the course of that dialogue leading up to and directing the victims into the bedroom.

d. Continual holdings both victims at gunpoint by the defendant.

e. The defendant shooting the male victim at close range between the eyes.

The defendant firing a second shot into the head of the male victim.

The defendant and his companion engaging in dialogue in the proximity of the male victim followed by four shots, the bullets of which were found in the head and body of Mary Jane Stout.

[547.] 3. Failure of the defendant and his companion to render assistance to the victims.

4. Defendant and his companion fleeing immediately from the scene with the victims' automobile and personal property including firearms and ammunition.

5. The defendant actively participated in the sale of guns stolen from the home of the victims.

6. The course of conduct of the defendant both before and after the commission of the offense in the travel through the country with a quantity of beer and guns.

7. The defendant's companion firing a gun into a posing vehicle en route.

8. The defendant made no effort to disassociate himself from his companions.

9. The direct evidence of a gang operation of robbery, assault and other crimes.

And this Opinion is signed by the three Judges of this Court.

Have counsel for the State of Ohio anything they wish to place in the record before sentence is pronounced?

MR. SCOTT: No, Your Honor.

JUDGE HENDERSON: Have counsel for the defendant anything they wish to place in the record before sentence is pronounced?

MR. STEPHENS: No, Your Honor.

[548.] JUDGE HENDERSON: Will the defendant and his counsel please stand?

Does the defendant John David Stumpf wish to make any statement in his own behalf or present any information in mitigation of his punishment? Mr. Stumpf?

THE DEFENDANT: No, sir.

JUDGE HENDERSON: The defendant having heretofore withdrawn his pleas of not guilty to Count 1 and specification 1, as amended, and specification 4 of said Count 1 and having entered a plea of guilty to said Count 1 and specification 1, as amended, and specification 4 of said Count 1 in violation of Section 2903.01 (B) entitled Aggravated Murder and specification 1, being in violation of Section 2929.04 (A) (3) and specification 4, being prescribed by Section 2929.71 and having been found by this Court guilty of said Count 1 and specification 1, as amended, and Count 4--or and Specification 4, and the Court having unanimously found beyond a reasonable doubt that the aggravating circumstances the defendant John David Stumpf was found guilty of committing outweigh the mitigating factors presented by the defendant; the court also considered the argument of counsel, the statement of the defendant and the presentence of investigation. Therefore, this court orders a Writ of Execution of the death penalty be issued, directed to the Sheriff of [549.] Guernsey County, Ohio. The Sheriff shall convey John David Stumpf within 30 days in a private manner to Columbus Correctional Facility where the defendant will be delivered to the Warden. The Warden shall keep the defendant in custody until January 10, 1984, at which time the sentence of the Court will be carried out in accordance with Section 2949.22 o the Revised Code of Ohio.

The Court having found you guilty of the firearms specification 4 prescribed by Section 2929.71 and having sentenced you to 3 years actual incarceration upon the specification Count 2, the Court finds that the felonies of Count 1 and County 2 were committed as a art of the same act or transaction and only one 3 year term of actual incarceration is being imposed. The sentence imposed for violation of Count 2 will be served consecutively with the sentence imposed for violation of County 1 and specification 1.

This being a capital case with the death penalty involved, Mr. Stumpf, you are advised that a review of the sentence of death by the Court of Appeals and by the Supreme court of Ohio will be conducted upon the appeal at the same time as the other issues are reviewed.

Now, as required by Criminal Rule 32, I wish to advise the defendant that he has the right to appeal. That if he [550.] is unable to ay the cost of an appeal, he has the right to appeal without payment. If he is unable to obtain counsel for an appeal, counsel will be appointed without cost. If he is unable to pay the cost of documents necessary to an appeal, such documents will be provided without costs and he has the right to have a notice of appeal timely filed on his behalf.

Upon defendant's request the Court shall forthwith appoint counsel for the appeal.

Mr. Stumpf, is it your desire that the Court at this time appoint counsel for your appeal?

MR. STEPHENS: It is, Your Honor.

JUDGE HENDERSON: Mr. Stumpf, is it your desire to have Mr. Tingle and Mr. Stephens appointed as your counsel for the purpose of appeal?

THE DEFENDANT: Yes.

MR. STEPHENS: Your Honor, at this time I believe it would be, after I consult with him, the client's desire to have the State Public Defenders Office appointed to represent him on the appeal, your appellate district.

JUDGE HENDERSON: The Court is going to appoint Mr. Tingle and Mr. Stephens as your attorneys.

MR. STEPHENS: Fine, Your Honor.

JUDGE HENDERSON: In Compliance with Revised Code Section 2929.03 (F) the Court will file a written Opinion [551.] required to be prepared by it with the Clerk of the Fifth District of the Court of Appeals and with the Clerk of the Supreme Court of Ohio within fifteen days.

Gentlemen, you may be seated. Is there anything further from the counsel for the State of Ohio?

MR. SCOTT: Nothing, Your Honor.

JUDGE HENDERSON: Anything further from counsel for the defendant?

MR. TINGLE: No, Your Honor.

MR. STEPHENS: Nothing, Your Honor.

JUDGE HENDERSON: I believe that the record is already clear that certain documents have been nolled, is that correct, Mr. Scott?

MR. SCOTT: That is correct, Your Honor. We are in the process of preparing the entry.

JUDGE HENDERSON: Judge Rice have you anything further?

JUDGE RICE: Nothing further.

JUDGE HENDERSON: Judge Bettis?

JUDGE BETTIS: No.

JUDGE HENDERSON: Then this Court stands adjourned.

(Whereupon, at 10:20 o'clock a.m. the foregoing proceedings were terminated.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

CASE NO. 9684

STATE OF OHIO,

Appellee,

vs.

JOHN DAVID STUMPF,

Appellant.

Transcript of Trial Proceedings held on Tuesday, October 1, 1985 before the Honorable John E. Henderson, Judge, and the Honorable J. Warren Bettis.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the Appellee,

CRAIG M. STEPHENS
LEWIS M. TINGLE
Attorneys at Law
122 E. 8th St.
Cambridge, OH

For the Appellant.

[illegible]

* * *

[13]

* * *

MR. TINGLE: If the Court please, the motion which has been filed on behalf of the defendant requests in the alternative the withdrawal or leave to withdraw the plea of "guilty" previously entered by the defendant and in the alternative for a new hearing to be conducted concerning the penalty to be imposed against this defendant. In support of that motion, I believe the State of Ohio, the Prosecuting Attorney, will agree to a stipulation that the testimony adduced at the trial of Clyde Daniel Wesley by or from one James Eastman, Case #9692, and also the testimony of Clyde Daniel Wesley in that same case can be admitted for consideration of the Court as it relates to the motion filed by the defendant as the testimony in the entirety of both witnesses.

[14] MR. SCOTT: Upon the representation of the Court Reporter that what Mr. Tingle has is, in fact, the entire testimony of Mr. Wesley and the entire testimony of the witness Eastman, I'll agree that it be stipulated that that is what it is and nothing more rather than bringing the Court Reporter to the stand and doing all those things. If she indicates to us that that is the complete transcript of those two people, I have no problem in putting it in.

JUDGE HENDERSON: Do I understand the stipulation is that the testimony of these two individuals, Clyde Daniel Wesley and Mr. Eastman, that may be received in evidence in this manner?

MR. SCOTT: As to that's what it is and nothing more, that that was the testimony as given in the Wesley case.

JUDGE HENDERSON: Very well.

MR. TINGLE: On that basis, I would offer Defendant's Exhibit "2" and "3" then.

JUDGE HENDERSON: And on that basis, those are admitted, "2" and "3".

MR. TINGLE: If the Court please, in support of the notion then that is the only testimony or physical evidence which will be offered in support of the motion. I would like to address the Court on [15] the issue itself.

JUDGE HENDERSON: Very well.

MR. TINGLE: If the Court please, the basis upon which the motion is filed or brought to the Court's attention is the fact that at the time of sentencing, this Court, as required by law, issued a written finding; and part of that finding was or were the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The first of those items listed under number 1 that the Court finds beyond a reasonable doubt that the defendant was the principal offender in Count 1 of the indictment. The State of Ohio during the trial of Clyde Daniel Wesley, Case #9692, produced a witness by the name of James Eastman. To summarize briefly, Mr. Eastman had been a cell mate of Clyde Daniel Wesley while he was incarcerated in the Guernsey County Jail following his extradition from the State of Texas. It was the testimony of Mr. Eastman that during the course of their companionship in that cell, Mr. Wesley related to him the story of this crime and how it

occurred. The testimony of Mr. Eastman, found on page 12 of that transcript of his testimony, [16] does indicate, and he stated directly, that as they were getting ready to leave, Wesley related to him he heard her moan, meaning Mrs. Stout, or cry out something, turned around and shot her again. Wesley said he went hack and shot Mrs. Stout again. Put into the context of the entire testimony, the shooting of Mrs. Stout as related by Mr. Eastman, James Eastman, occurred in two phases. She was shot, they left the room, as they were leaving they heard her moan, she was shot again. Comparing that to the testimony of Clyde Daniel Wesley as offered at trial, that scenario is followed fairly closely. But when questioned about how James Eastman could have known these things or where he got his information, Mr. Wesley's explanation was that during the course of their companionship in that jail cell, he had a transcript of the case of "State versus John Stumpf" to use in his own trial preparation, that he discussed the case somewhat with Mr. Eastman and Mr. Eastman had access to that transcript and read the account in the transcript; thereby acquiring the knowledge [17] that he testified to. The problem with Wesley's explanation is the fact that there is no account that matches that situation or that scenario in the transcript of John David Stumpf. There is no account which states Mrs. Stout was shot, they left the room, heard her moan, went back and shot her again. The only place that that appears is in the case of Clyde Daniel Wesley. It would have been impossible for Mr. Eastman to have acquired that knowledge from the transcript of John David Stumpf. It, therefore, follows that he must have acquired that knowledge from Clyde Daniel Wesley personally.

On that basis, it does indicate that the Court's finding that the defendant, John Stumpf, was the principal offender. In other words, the one who shot Mary Jane Stout is contradicted by the testimony of James Eastman, and the explanation of Clyde Daniel Wesley is not sufficient to

contradict James Eastman's testimony. It's on that basis, then that we have filed this motion, brought it to the Court's attention, asking for the alternate forms of relief. Thank you.

JUDGE BETTIS: Well, you were counsel for Mr. Stumpf, and I'm sure he pled "guilty", and I'm sure you reviewed [18] the details of his plea with him many, many times. Both of you are very competent counsel, I heard you. At least, that's my view. Didn't you, Lew?

MR. TINGLE: Yes.

JUDGE BETTIS: How many hours did you spend with Mr. Stumpf in discussing the case with him before you pled him guilty?

MR. TINGLE: Quite a few, Your Honor. Accurately, I couldn't tell you, it was a substantial number.

JUDGE SETTIS: All right, thank you.

JUDGE HENDERSON: Mr. Scott.

MR. SCOTT: If the Court: please, I believe we need to talk about two other things before we get to the substance of what Eastman had to say and what Wesley had to say. Initially, I think we need to look at Section 2945.36 which talks about a three judge panel in a death penalty case and what procedurally is necessary. As I mentioned earlier, the statute says that this Court can determine matters of law and fact by a majority decision. However, decisions regarding the guilt, or in this case, the imposition of the death penalty, must be unanimous. With that in mind, I think we need to look at what the defendant is asking by means of this motion. Initially, the defendant is asking for a withdrawal [19] of the previous plea of "guilty". It seems to me that is a matter of law and does not go to the question of the imposition of the

death penalty nor to the question of guilt. And that can be initially, I believe, determined by the remaining two judges in this panel, being a majority of the original panel. As far as the merits of that motion, there is no indication as the Court has inquired that Mr. Stumpf was not fully aware of what he was doing when he entered the plea of "guilty". It was, if you'll recall, a negotiated plea wherein he entered a plea of "guilty" to certain counts and to certain specifications to those counts in return for the State dismissing certain other counts or certain other specificat[illegible]. I believe in our memorandum in opposition to the motion we cite the provision of Criminal Rule (3[illegible] which states that a motion to withdraw a "guilty plea is directed to the sound discretion of the Court. And I'll quote, "A motion to withdraw a plea of "guilty" or "no contest" may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit [20] the defendant to withdraw his plea". We cite a case or two in here which indicates that if the defendant knew what he was doing and in the absence of coercion or mistake or something of that nature which casts doubt on the voluntariness of it or whatever, the motion should be denied. We heard nothing from the defense in this case in support of this motion to indicate that the defendant was anything than fully informed and that he intelligently made the decision with the assistance of his counsel after having everything explained to him that pertains to this plea of "guilty" and that he agreed and that the "guilty" plea proceedings were, in fact, undertaken and the inquiries of the Court made at that time, which I believe is all a matter of record in this case.

So, therefore, I think that the initial motion by the defendant to withdraw the "guilty" plea should be denied because there's been nothing shown to the Court to justify doing anything else.

With regard to the other alternative relief requested by the motion, it is tantamount to a motion for a new trial, at least in part, with regard to the sentencing phase of the former trial. The Court, having following the plea of "guilty", [21] heard the evidence and found the defendant "guilty" of the offense, guilty of the specifications by unanimous decision of the three judge panel. There is no reason to disturb that finding because of the fact that this is not a case where the trial proceeded on a "not guilty" plea; but the defendant admitted in open Court, as we cite in our memorandum, that there is nothing more solemn or whatever than a plea of "guilty" where he admitted that he did, in fact, purposely kill Mary Jane Stout and pleaded "guilty" to certain of those specification. It seems to me that in order to determine this part of the motion, the State would take the position that the remaining two judges can handle that as well because it is not a matter at this point directly dealing with the imposition of the death penalty nor is it a matter dealing with guilt, the finding of guilt. It is a question or a request to vacate the former sentence which would be a matter of law, arguably at least. The is very little, if any, authority that I could find on this exact problem where we don't have an intact panel left, but it would be our position that the two remaining judges can make that decis[illegible] because it is a matter of law. And whether or no[illegible] [22] the Court feels that the presence of the witness Eastman is necessary in order to do that or whether the Court can read the record and determine from the record of his, testimony in the Wesley case, is a matter for the Court to determine. I would hasten to go on and say that although the Court did in it's unanimous opinion setting forth the reasons why the aggravating circumstances outweighed the mitigating circumstances shown, did make a finding that the defendant, Stumpf, was the principal offender in the case, that finding was not necessary under the specifications to which the defendant entered his plea. That even if the Court found that the defendant was an aider and abettor or even if the evidence

showed that the defendant was an aider and abettor under those specifications, the death penalty still can be imposed. The question really before the Court is whether or not the information provided now to the Court would change the Court's finding because the evidence is in conflict on the point; that is, that Mr. Wesley testified at his own trial, and the Court has that testimony that he did not fire the fatal shot. Eastman's testimony was as to a conversation with Wesley which occurred long after the Stumpf trial [23] had been concluded. The circumstantial evidence, the ballistics evidence certainly supports the Court's original finding that Stumpf was the--in effect, the shooter or the principal offender.

Now, it would seem to me the Court's first determination would be as to whether or not this new information, being the testimony of Wesley and the testimony of Eastman, is sufficient to change the Court's opinion as to whether or not the evidence still showed or did not show that Stumpf was the principal offender. And if the Court should then conclude that the evidence now, the newly discovered evidence if you will, does change the picture to the point where that finding is not proper, whether or not that makes any difference; nevertheless, on the imposition of the death penalty--

JUDGE BETTIS: Of course Mr. Scott, pardon me for interrupting, but if we had not, been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

[24] MR. SCOTT: That's right. I think the first decision this Court would have to make is whether or not this additional information changes the picture as to that finding that was

previously made. And if it does, does that, in turn, change the appropriateness of the death penalty in this case in the judgment of the Court?

JUDGE BETTIS: Let me follow that up. My recollection was that Wesley was in jail in Texas at the time of the Stumpf trial.

MR. SCOTT: That's correct, sir.

JUDGE BETTIS: You were aware of that, were you not, Mr. Scott?

MR. SCOTT: Yes, I knew of that.

JUDGE BETTIS: And you were aware of it too?

MR. SCOTT: Everybody was aware of it.

JUDGE BETTIS: There wasn't anything to prevent either the State or the defense from talking to Mr. Wesley. Now, as a practical matter, he probably wasn't going to have very much to say to anybody; but you didn't ask him, did you?

MR. TINGLE: The defense did not, no, Your Honor.

JUDGE BETTIS: Or anyone on behalf of the defense. He was never asked by anybody, so he was available?

MR. SCOTT: I believe that's correct, yes, Your Honor.

JUDGE BETTIS: We knew he was in Texas, defense knew that.

[25] MR. TINGLE: He was fighting extradition. Though, as far as availability for trial, he was not available.

JUDGE BETTIS: You and I know as a practical matter he probably wasn't going to give you the time of day if you went down. But the point is, you never asked him what he did in relation to Mrs. Stout or anybody else, did you?

MR. TINGLE: I think the prosecution was in Texas at that time during the period he was fighting extradition. What transpired between them and Wesley and Wesley's counsel in Texas I'm not privy to.

JUDGE BETTIS: Okay, but you didn't.

MR. SCOTT: I can tell you, but there's no record on it.

JUDGE BETTIS: Let me follow up. No one for the defense asked Mr. Wesley; and at least at this point, all we have is verbiage, it's not evidence. We have verbiage, we have a statement by Mr. Tingle that this is what Wesley would do, and we have a letter allegedly signed by Mr. Stout. So is there any evidence from anybody?

MR. SCOTT: I have nothing to present, Your Honor.

JUDGE BETTIS: In the record so far that, in fact, Wesley was the trigger man.

MR. TINGLE: Eastman's testimony, Your Honor. At Wesley's trial.

[26] JUDGE BETTIS: Okay. And isn't there some--- don't we have some right to read that and determine whether that is, in fact, credible testimony?

MR. TINGLE: Very definitely, Your Honor.

JUDGE BETTIS: I haven't read it. I'm certainly going to take the privilege to do so.

MR. TINGLE: And compared also against Wesley's testimony.

JUDGE BETTIS: I'm going to read both Eastman and Wesley because I didn't have the privilege of hearing that testimony.

MR. SCOTT: If it's appropriate, I can tell you what happened in Texas when I talked to his Texas lawyer.

JUDGE HENDERSON: I don't believe that's necessary at this time. We're hearing the matter of Eastman at this time, and we're not hearing the motion which has not been made yet.

MR. SCOTT: The inquiry was made, and I have an answer. But if you don't want to hear it at this point, that's fine.

JUDGE BETTIS: It's a motion of the defendant, not the State.

MR. SCOTT: But I have nothing other to say than it seems to me I don't presume to advise this Court how to proceed. We are under a set of circumstances, which to my knowledge, has not occurred under our present set-up with regard to capital cases. It [27] seems to me the Court must first look at what you have on the record there that was presented today to determine if you can determine from that alone whether or not Eastman's testimony is of sufficient credibility to warrant further consideration or whether you need to hear testimony from Eastman live. It seems to me that's the first thing you need to consider and once you have made that determination as to whether or not a new trial is

warranted on the basis of that evidence. I believe that this Court procedurally--this Court can proceed with the two remaining members of the panel because we are not dealing directly with the imposition of the death penalty nor directly with the adjudication of guilt. We are dealing with a matter of law as to whether or not the previously imposed sentence shall be vacated. Thank you.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Nothing further, Your Honor.

JUDGE HENDERSON: We'll take this matter under advisement. The Court is going to, so that they don't get lost, is going to present two items: the letter from Mr. Damiani, Supreme Court, which I think all counsel have received a copy and also the judgment entry of the [28] Court of Appeals which remands this case, if necessary. I believe it says for the purpose of the determination of any and all motions now, parenthesis, then pending before it. Those two matters, I believe, we'll just have them put into the record.

Anything further? We'll take this matter under advisement.

(Whereupon, at 3:17 o'clock p.m. the foregoing proceedings were terminated.)

* * *

[Transcript of State's opening statement, R. 33,Transcript of Wesley Trial, April–May 1985]

* * *

[1658] help you follow the evidence as it is presented. I'm going to call on the prosecutor or the assistant prosecutor at this time. I believe, is it Mr. Scott who's going to make the opening statement?

MR. SCOTT: That's correct, Your Honor.

THE COURT: For the State of Ohio, Mr. Scott.

MR. SCOTT: Thank you, Your Honor. May it please the Court, Gentlemen of counsel, Ladies and Gentlemen of the Jury, you have now at long last after many days been seated and sworn as the Jury which will hear and decide this case. Before we begin with the actual presentation of testimony and evidence in this case, both Mr. Brown or Mr. Raptis on behalf of the defendant and myself are given the opportunity to address the Jury in what is referred to as opening statements. Now, although we have mentioned from time to time over the last eight days or so in the selection of a Jury briefly the facts of this case and the events that took place on May 14, 1984 at the Stout residence, this is really the first opportunity we've had to tell you what this case is all about and the facts which we believe will be revealed by the evidence as it's presented. Now, the purpose of opening statements is to enable us to tell you in advance, to give you some sort of [1659] a bird's-eye view, if you will, of the factual events and situations presented in this case. It is hoped that by means of these opening statements the bits and pieces of testimony which you will hear from the witness stand, from the various witnesses, will be more meaningful for you, and you'll be able to fit those bits and pieces, the jigsaw puzzle, if you will, over into the over-all factual

picture involved in this case. As has been mentioned a time or two, what we say on opening statements are not evidence. The only---likewise, at the Stout residence are not evidence. Both the opening statements and the view are designed to assist you in understanding the evidence as it's presented from the witness stand.

On June 14, 1984 Grand Jury of this county returned an indictment against this defendant charging Clyde Daniel Wesley with committing five separate offenses all on May the 14th of last year in the shooting incidents at the Stout residence. Once again, the indictment is not evidence, the indictment is merely the formal accusation of crime made against this defendant. It is nothing more than the procedural means by which this matter comes [1660] before this Court for trial. It informs---as has been mentioned, it informs the defendant of the nature of the charges against him precisely, and it also determines precisely what the State of Ohio is required to prove beyond a reasonable doubt in order for the Jury to properly find the defendant guilty of these offenses.

Let's review briefly the five charges. The first count in the indictment charges the crime of aggravated murder in violation of Section 2903.01(B) of the Oho Revised Code resulting in the death of Mrs. Stout. The first count also contains four specifications. The first three specifications, (1) (2), and (3), set forth aggravating circumstances involved in this killing which are referred to as sometimes the death penalty specification we talked about. The fourth specification charges that the defendant had a firearm on his person when he committed the offense, and this has nothing to do with the death penalty. The second count charges attempted aggravated murder in violation of Ohio Revised Code, Section 2923.02(A), resulting from the wounding---the gun shot wounding of Norman Stout. This second count also has what's referred to as a gun specification. That is, that the defendant had [1661] a firearm on or about his person at the

time he committed that offense. The third count is the offense of aggravated robbery in violation of Section 2911.01 of the Code and involves the stealing of property while armed with a deadly weapon. Again, a gun specification to the aggravated robbery count that the defendant had a firearm, that the deadly weapon involved was a firearm, which he had on or about his person at the time he committed the offense. The fourth count is a grand theft of a motor vehicle charge under Section 2913.02. It is the actual stealing of a motor vehicle from the Stout residence. The fifth count is grand theft of a firearm under the same Section, 2913.02, that the actual stealing of a handgun from the Stout residence. There are no specifications to the fourth and fifth counts.

Now, these are the five precise crimes with which the defendant stands charged in the indictment and which the State will prove beyond a reasonable doubt. The indictment has been mentioned a number of times at this time I'd like to read the essential allegations in the indictment:

Count one: "The jurors of the Grand Jury of the State of Ohio within and for the body of the [1662] county aforesaid, that is, Guernsey County, on their oaths in the name and by the authority of the State of Ohio, do find and present that Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 24th day of may, 1984, at the County of Guernsey, aforesaid, did personally cause the death of another person to wit, Mary Jane Stout, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit the offense of aggravated robbery, in violation of Ohio Revised Code, Section 2903.01(B) entitled Aggravated Murder, and contrary to the statute in such case made and provided against the peace and dignity of the State of Ohio." Specification one to the first count: "The Grand Jurors further find and specify under Ohio Revised Code, Section

2924.049(A)(3), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the above named Clyde Daniel Wesley to wit, aggravated robbery." Specification two to the first count: "The Grand Jurors further find and specify under Ohio Revised Code, Section 2929.04 (A) (5), and in [1663] compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons to wit: Mary Jane Stout and Norman Stout." Specification three to the first count: "The Grand Jurors further find and specify under Ohio Revised Code Section 2929.04 (A) (7), and in compliance with Ohio Revised Code, Section 2941.14, that the aforesaid offense was committed while the above named, Clyde Daniel Wesley, was committing or attempting to commit or fleeing immediately after committing or attempting to commit the offense of aggravated robbery and further that the above named, Clyde Daniel Wesley, was the principal offender in the commission of the offense of aggravated murder as charged in the first count." Specification four to the first count: "The Grand Jurors further find and specify and in compliance with Ohio Revised Code, Section 2941.141, that the above named, Clyde Daniel Wesley, had a firearm on or about his person or under his control while committing the aforesaid offense. That is, the first count of aggravated murder with the four specifications." Count two: "The jurors of the Grand Jury [1664] of the State of Ohio within and for the body of the County aforesaid, on their oaths in the name and by the authority of the State of Ohio, do find and present that Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, did purposely engage in conduct which if successful, would have constituted the offense of aggravated murder by then and there purposely attempting to cause the death of another

person, to wit: Norman B. Stout, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit the offense of aggravated robbery, all being in violation of Ohio Revised Code, Section 2923.02 (A), entitled Attempted Aggravated Murder, and contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." Specification to the second, it's the same as specification four to the first count, that he had a firearm on or about his person. The third count: "The Jurors of the Grand Jury of the State of Ohio within and four the body of the County aforesaid on their oaths, in the name and by the authority of the State of Ohio, do find and present that [1665] Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey aforesaid, in attempting or committing a theft offense as defined in Ohio Revised Code, Section 2913.01 to wit, the offense of Grand Theft of property of one Norman B. Stout and one Mary Jane Stout, or in fleeing immediately after such attempt or offense did then and there have a deadly weapon to wit; a firearm on or about his person or under his control." Armed robbery. Armed robbery is what we're talking about "in violation of Ohio Revised Code, Section 2911.01, entitled "Aggravated Robbery" and contrary to the form of the statute in such case made and provided against the peach and dignity of the State of Ohio." Again, that he was armed with a firearm, it's a specification to that third count. Count four: "The Jurors of the Grand Jury of the State of Ohio within and for the body of the County aforesaid on their oaths in the name and by the authority of the State of Ohio, do find and present Clyde Daniel Wesley, Lake Tawakoni, Texas, on or about the 14th day of May, 1984, at the County of Guernsey, aforesaid, did with purpose to deprive the owner thereof, Mary Jane Stout, knowingly obtain or exert control over a certain motor vehicle [1666] to wit; a 1976 Plymouth Sedan, Serial #RH41G6A160499, by threat in violation of Ohio Revised Code, Section 2913.02, entitled Grand Theft of a

motor vehicle contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." The fifth count is exactly the same as count four Grand theft, only it's Grand Theft of a firearm, a 357 caliber Smith & Wesson, Model 28-2, Serial #552178, handgun owned by Norman Stout. There are no specifications as I mentioned in counts four and five the two grand theft, Grand Theft motor vehicle in count four, Grand Theft firearm count five. Now that is the substance of the indictment with which the defendant stands charged in this case. Each of these crimes as you can hear from the reading of them are brought under specific sections of the code aggravated murder, attempted aggravated murder, aggravated robbery, grand theft, and grand theft.

Now, as you can readily see, there are certain elements of proof required of the State, essential elements of the crime which the State must prove and will prove beyond a reasonable doubt in order for the Jury to properly convict or find the defendant guilty of each of these separate offenses. [1667] I'd like to review very briefly with you the elements of the offenses charged. The first count of aggravated murder in violation of 2903.01 (B) of the code, the State must prove that (1) on or about May 14, 1984 (2) this defendant purposely (3) caused the death of Mary Jane Stout (4) while committing or attempting to commit aggravated robbery or while fleeing immediately after committing or attempting to commit the offense and (5) that the offense was committed in Guernsey County. Those are the essential elements of the crime of aggravated murder as charged in count one of this indictment. Specification one: the elements of specification one to the first count are that the aggravated murder was committed by the defendant for the purpose of escaping detection, apprehension, trial, or punishment for another offense. In this case the aggravated robbery, the armed robbery, specification two to the first count. That the offense of aggravated murder was committed

by the defendant, the offense was part of a single course of conduct which involved the purposeful killing or attempting to kill two or more persons; in this case, the killing of Mary Jane Stout and the wounding of Norman Stout. Specification three to the first count: that the [1668] offense of aggravated murder, once again, was committed by the defendant (2) while the defendant was either committing, attempting to commit or fleeing after committing or attempting to commit the offense of aggravated robbery and that the defendant was the principal offender in the case.

Specification four, as I've mentioned, is the gun specification that merely needs to be proven that at the time he committed the offense of aggravated murder, he had a firearm on or about his person or under his control. Count two: attempted aggravated murder, very similar to the murder except the act was not committed. That on or about the 14th day of May, Clyde Daniel Wesley purposely attempted to cause the death of another person, Norman Stout, while the defendant was committing, attempting to commit or fleeing immediately after committing or attempting to commit the crime of aggravated robbery, armed robbery, and that the crime, once again, was committed in Guernsey County.

There is also a firearm specification to the attempted aggravated murder count; that he was armed at the time with a firearm, aggravated robbery. The third count: that this defendant on or about, once again, May the 14th of 1984, in attempting or [1669] committing a theft offense; that is, while stealing property or attempting to do so or while fleeing immediately after stealing or attempting to steal, did then and there have a deadly weapon on or about his person or under his control, and once again, that the crime was committed in Guernsey County. There is a firearm specification to the aggravated robbery; that is, that the deadly weapon used was a firearm, that he had it on his person and under his control.

Fourth count: Grand theft of a motor vehicle. That on or about May 14, '84, this defendant knowingly obtained or exerted control over a motor vehicle; in this case, a 1976 Plymouth, owned by Mary Jane Stout with purpose to deprive the owner thereof by the use of threats, and that the offense was committed in Guernsey County.

Count Five is the same as Count four, only the item stolen in that fifth count is the 357 Magnum Revolver owned by Norman Stout. There is no specification to either the fourth count or the fifth count.

Now, these are the essential elements of each of these crimes and each of these specifications as charged in the indictment which the State is [1670] required and will prove to you by evidence, convincing you beyond a reasonable doubt. Let's look at the facts. Before this shooting incident on May 14, 1984, Mary Jane Stout and her husband, Norman Stout, both being then 54 years of age, lived in a home they owned, located in the western part of Guernsey County, approximately one mile this side or east of the Guernsey, Muskingum County Line. The house is located fairly close to Interstate 70. My estimate would be somewhere in the range of one hundred yards or so north of the interstate and is located on County Road 44 which passes underneath the interstate near their home. Mr. and Mrs. Stout lived alone there in the house as their children were grown and gone from the home.

Now, immediately prior to May the 14th, this defendant, Clyde Daniel Wesley, had been living in West Tawakoni, Texas with his mother, I believe. That town is located in, I believe, Hunt County, Texas, somewhere about ---not too far northwest of Dallas. He had lived in Texas for some time; however, he had previously lived in the Cannonsburg, Pennsylvania area which is in the vicinity of

Washington, Pennsylvania. During the period of [1671] time he was living in Cannonsburg, Pennsylvania, he had a close friend there by the name of John David Stumpf. However, the two of them hadn't been together or seen each other from the time this defendant moved to Texas. On May the 11th, 1984, Clyde Daniel Wesley and a young man by the name of Norman Leroy Edmonds of Mesquite, Texas, which is another town in the Dallas area, who had worked together on construction there, decided to leave Texas to go to Cannonsburg or to Washington, P.A. for a visit. It was principally Wesley's idea, this defendant's idea, because he wanted to visit his friends there. The two of them left on that date on May 11th traveling in a brown and tan colored 1977 Pontiac Grand Prix automobile owned by Edmonds and bearing black and white Texas license tags, QAX 229. They arrived in Washington, Pennsylvania, the evening of Sunday, May the 13th, 1984. The following day being Monday, May the 14th, 1984, Wesley, this defendant, and Edmonds got together with John David Stumpf. Wesley's friend in Cannonsburg which is about ten or fifteen miles from Washington, P.A. They spent the afternoon of Monday, May 14th shooting pool and just passing the time with no apparent purpose. That was the [1672] first time Edmonds had met John David Stumpf. At that time there in Cannonsburg on May the 14th this defendant, Clyde Daniel Wesley, had in his possession a black 25 caliber automatic pistol which he had owned for some time and which he regularly carried. Edmonds had in his car a chrome colored 25 caliber Raven Automatice Pistol and a nine millimeter black automatic pistol, both of which Edmonds had purchased in Texas sometime before they left Texas on May the 11th. During the course of the day on Monday, May the 14th of '84, the three of them had been talking about guns generally and during the course of that conversation, Edmonds turned over to Stumpf the chrome colored 25 caliber Raven for him to examine. During the course of the reminder of the events of that date, that chrome colored Raven 25 caliber automatic

was never returned by Stumpf to Edmonds. Later in the day, the late afternoon or early evening hours on the 14th of May, while driving around and for no apparent reason, they came into the State of Ohio. They were westbound on InterState 70. They entered Guernsey County somewhere around 9:00, approximately, the evening of May the 14th or shortly before 9:00 p.m. As they were [1673] traveling westbound on Interstate 70 and as they approached the overpass over County Road 44 near the Stout residence, they saw the house somewhat isolated, no near neighbors, and decided to stop to see what they could steal. Edmonds was driving the car at the time and one of the other two, I'm not sure which made the request to stop. Edmonds stopped the car at the overpass near---on the interstate near the Stout residence. This defendant and Stumpf left the car and walked down the bank towards the house, both of them armed with 25 caliber automatic pistols. This defendant having his own black pistol that he normally carried and Stumpf having the chrome colored Raven which he had acquired from Edmonds. Edmonds stayed with the car and did not go to the Stout residence. Several minutes later as he stood by the car at the overpass, Edmonds saw an outside light near the garage entrance or parking lot, if you will, of the driveway of the Stout residence come on, an outside flood light type arrangement, and he then saw a car being backed from the garage out into the parking area. He became frightened at this, got in his car, and took off heading westbound, continuing westbound towards Zanesville. He was [1674] low on gas, so he pulled off the interstate at the next exist for westbound traffic beyond New Concord which, I believe, is the Norwich exit to get gas. While the car was being gassed, Edmonds made a collect phone call to his father in Texas from a pay phone at the station. Edmonds had no money to pay for the gas, so when the car was filled up, he just left without paying. There were two young men there who were just loafing around, as I believe they knew the attendant who was on duty, and they saw this take place so they gave chase.

Edmonds continued westbound towards Zanesville with them after him. At the next exit westbound beyond the Norwich exit, Edmonds decided he wasn't familiar with the area and he decided to go back towards Washington P.A., so he got off and stopped on the exit ramp, the next exit beyond Norwich. These two young men then caught up to him and accosted him or confronted him about the gasoline, and he still had his nine millimeter pistol, he fired some shots, they ran, and he took off eastbound back towards Washington, P.A.

Now then, going back to the Stout residence, After this defendant and Stumpf left the car and [1675] went to the residence, they knocked on the door and told Mr. and Mrs. Stout, they were both there, they told Mr. Stout that they had car trouble and they needed to use the telephone. Mr. Stout admitted them, they got inside, they did the phone or purportedly used the phone, whichever, and at that time they then both drew their handguns and said "this is a hold-up". While Stumpf held Mr. and Mrs. Stout at gunpoint in the kitchen areas where the phone was, this defendant went through other parts of the house looking for items to steal including the billfold of Mr. Stout and the 357 caliber revolver which was located in the bedroom. After a period of time they then herded Mr. and Mrs. Stout down the hallway from the kitchen area to the end of the hall where there are two bedrooms as you face the end of the hall: one to the right, one to the left. They put them in the bedroom to the right. Mr. Stumpf continued to hold the two of them at gunpoint while this defendant ransacked the rest of the house, particularly the bedroom across the way. At this point in time, Mr. Stout, his wife was seated on the bed back towards the outside wall, he was closer to the doorway to the hallway, and Stumpf had the gun on them [1676] in the doorway. Mr. Stout at that point became convinced that they were both going to die and that he thought he might be able to save his wife's life if he rushed Stumpf and got him out of that

bedroom, perhaps, and gave her an opportunity to lock the door. Mr. Stout did rush Stumpf. This defendant was in the other bedroom at that time, but before he could reach Stumpf, Stumpf shot him right in the forehead once. This defendant came to the scene. Stumpf then shot him a second time in the top of the head. This defendant fired at him with his black gun, but missed. That gun apparently jammed because it did not fire any more, and the evidence from the crime laboratory will show that it has a tendency to jam after firing the first shot. After being struck almost between the eyes and in the top of the head, Mr. Stout fell to the floor, more or less, in the hallway and partially in the bedroom away from where his wife was. He was still alive, partially conscious, but unable to move, unable to get up from where he lay. Believing that he had killed Mr. Stout, John David Stumpf pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point this defendant [1677] whose own gun was jammed, picked that chrome colored Raven up and as Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime they thought they had committed in the other killing they thought they had committed. Two of the bullets fired---two of the four bullets fired into the body of Mrs. Stout penetrated her brain. She was killed almost instantly and fell on the bed where she was seated in her own bedroom. After firing the shots, this defendant then followed Stumpf back down the hallway down the basement. The keys were available there to the Plymouth automobile owned by Mrs. Stout, and they stole that car along with certain other items including the 357 Smith & Wesson Magnum Revolver owned by Norman Stout which they found in the bedroom. They drove the Plymouth over to the----to an area about fifty miles or so, an isolated area near Washington, P.A. where they abandoned it after wiping it clean of finger prints. The car was later found by Pennsylvania State Police. After abandoning the Plymouth vehicle, Stumpf and Wesley then made their way somehow to Washington, P.A. and went to a

friend's house where Edmonds in the meantime had gone, and they [1678] met up with Edmonds again the afternoon of May the 15th; that is, this shooting took place some place between 9:00 and 9:30 the evening hours the 14th. This would be the afternoon of the 15th. After all that had happened, Edmonds decided he wanted to go back to Texas. He didn't have any money, so he decided he wanted to sell that nine millimeter pistol the following day on the 16th. John David Stumpf who was still residing in Cannonsburg phoned a man by the name of John Dino, also in Cannonsburg, who indicated he was interested in buying that nine millimeter pistol. This defendant still had in his possession the 357 caliber revolver he had taken from the Stout residence the evening of the 14th. All three of them; that is, Stumpf, Edmonds, and this defendant, Wesley, drove to Dino's house in Cannonsburg. They sold both handguns, the nine millimeter pistol and Stout's 357 caliber Magnum to Dino. Edmonds and this defendant then dropped Stumpf off at his home and went back to Texas.

Now, let's backtrack to the night of the shooting again. That evening Chris Stout, who is a son of Mary Jane and Norman Stout, had called several times that evening to try to get his parents there at home. He didn't get any answer and not [1679] knowing why he wouldn't get an answer and where they might be, he became concerned. Eventually, he called the New Concord Police Department, although that's outside the village, and asked them if they would check on the house. They did dispatch a cruiser there and that's how these shootings were discovered first by the New Concord Police Department. The Guernsey---being in Guernsey County and not under their jurisdiction, they notified immediately the Emergency Squad because Mr. Stout was still alive and the Guernsey County Sheriff's Department who went there and began the investigation. Norman Stout was transported by the New Concord Emergency Squad first to Guernsey Memorial Hospital and then to Bethesda

Hospital. Mary Jane Stout was pronounced dead at the scene by the Coroner who then ordered her body taken to Union Hospital in Dover for an autopsy which was done and the autopsy performed the following day on May the 15th.

In the meantime, the Muskingum County authorities, specifically, the Muskingum County Sheriff's Department, were looking into this shooting incident, the incident at the gas station and the shooting incident involving these two young men. [1680] They had obtained the Texas license number off Edmond's car, gave it to the Sheriff's people. Also, they were able to trace the phone call which was a collect call from the pay phone at the filling station. And through those efforts were able to get the name of Edmonds, Norman Leroy Edmonds, as a suspect. They were coordinating their efforts with Lt. VanHorn and the other officers from Guernsey County, because they believed, and as it turned out correctly so, that the filling station incident in Muskingum County was connected up with the shooting incident at the Stout residence.

On Friday the 18th of May, a warrant for the arrest of Edmonds was issued by Muskingum County authorities, and they requested the Dallas County Sheriff's Department to arrest him which was done. Dallas County authorities notified our local Sheriff's department and the Muskingum County authorities that they had him in custody. And Lt. VanHorn and Detective Simms of the Muskingum County Sheriff's Department flew down to Texas on 18th and interviewed Edmonds that night. Edmonds told the whole story as far as he knew it of what happened a t the Stout residence and named this defendant, Clyde Daniel Wesley, and John David Stumpf [1681] as the two other persons involved. Edmonds was brought back to Muskingum County the next day on the 19th by VanHorn and Simms. The 19th being, I believe, a Saturday. On Monday the 21st of May arrest warrants were issued by the Cambridge Municipal

Court charging both this defendant and Stumpf with the aggravated murder of Mary Jane Stout.

Stumpf was arrested in Cannonsburg, Pennsylvania on the 21st in the evening, the same day the warrant was issued and voluntarily returned to this county on the 22nd of May.

This defendant, Clyde Daniel Wesley, was arrested at his mother's home in Texas by Texas officers about the 21st of May. I'm not sure of that exact date, and ultimately was returned to Guernsey County in late November of last year.

Norman Stout underwent surgery the early morning hours of May the 15th performed by Dr. Camma, a Neuro-surgeon, at the Bethesda Hospital. The two bullets were removed from his head miraculously. After a lengthy period of treatment and therapy, he recovered, not entirely, but he recovered and survived, and he will be here to testify before you.

These are the facts which the evidence will [1682] prove to you beyond a reasonable doubt, to prove the truth of the charges contained in this indictment: aggravated murder, attempted aggravated murder, aggravated armed robbery, grand theft of a motor vehicle, grand theft of a firearm.

In conclusion, I simply ask that you try to keep your attention focused upon what it is this case is all about. The specific charges as best you can, they'll be reviewed again for you after all the evidence is in, but the elements of each charge, the elements of each specification, give your undivided attention to the witnesses. The witnesses for the State and for the defense, because it is you, as you've been told before, you must determine what the testimony to believe, what part of the testimony to believe, and the testimony that is in conflict, which testimony to believe.

And after you weigh the credibility, assess the credibility of the witnesses and attach weight to their testimony to determine what facts have been proven by the evidence. In deciding this case, we simply ask---we use a lot of lawyer's language, but we simply ask that you twelve persons use your collective good judgment and common sense in listening to this case, listen carefully to the evidence, [1683] listen to the law as the Court will give it to you, and arrive at a verdict where justice is served, keeping in mind that justice is a two-way street. Justices for this defendant, but likewise, justice for the State, the people of this State who also have a vital interest here. I am confident if you do that, that you will return a verdict of guilty as to each count and each specification charged in this indictment.

Thank you.

* * *

[Testimony of James Eastman (Wesley's cellmate), R.33, Transcript of Wesley Trial, April–May 1985]

* * *

[2511]you last saw her here?

A. All during the time that I was in bedroom number "1" she apparently moved.

Q. But you don't recall seeing her move at all?

A. No, she did not move in the instances that I was shot and then left the bedroom.

Q. There was some testimony, Mr. Stout, of Dr. Camma which has been alluded to by Mr. Brown of the wound to the--between the eyes and a wound to the vertex and you've also testified that you were struck. Is there a particular area in your--on your person where you were struck that you know about?

A. The scar on my forehead, yes.

Q. Are the events of that evening clearer in your mind today then they were last fall?

A. They are clearer, yes.

MR. SCOTT: I have no further questions.

MR. BROWN: No questions, Your Honor.

THE COURT: You may step down, sir.

MR. PLUMMER: Your Honor, the State's next witness will be James Eastman.

JAMES EASTMAN

was called as a witness, and having been first duly sworn, was examined and testified as follows:

[2512] THE COURT: Mr. Eastman, before you begin to testify I would remind you that there are cameras in the courtroom. Do you decline to be photographed?

A. Yes, sir.

THE COURT: You decline?

A. Yes.

THE COURT: You do not want to be photographed?

A. Yes, sir.

THE COURT: Very well, your wishes will be respected.

DIRECT EXAMINATION

BY MR. PLUMMER:

Q. Please state your name and address.

A. James Eastman.

Q. And what's your address, James?

A. Presently Guernsey County Jail.

Q. And are you a resident of Cambridge, Ohio?

A. Yes, sir.

Q. And how long have you lived in Cambridge?

A. All my life. Twenty-three years.

Q. You're twenty-three years old?

A. Yes.

Q. What is your date of birth?

A. July 15, 1961.

Q. Now, James, you're presently in the Guernsey County Jail, is that right?

[2513] A. Yes, sir.

Q. How long have you been there?

A. A little over three and a half months now.

Q. Now, James, do you have a prior felony record?

A. Yes, sir.

Q. And what does that record consist of?

A. Grand theft.

Q. And when were you convicted of that?

A. Approximately a year and a half, two years ago.

Q. And what were you convicted of grand theft for?

A. Stealing of antiques.

Q. Were you sent to the reformatory for that?

A. Yes, sir.

Q. And did you plead guilty to that?

A. Yes, sir.

Q. And when did you got o the reformatory, James?

A. About 18 - 19 months ago.

Q. Do you remember what date or what month you were sent to the reformatory?

A. November of '83, I think.

Q. 1983?

A. Yes, sir.

Q. And how long were you at the reformatory?

A. Thirteen months.

[2514] Q. And when did you get out of the reformatory?

A January 10th of '84.

Q. So, you were in the----

A. December 10th, excuse me.

Q. So, you were in the reformatory about thirteen months?

A. Yes, sir.

Q. From November '83 through December 19th, 1984, is that right?

A. Yes, sir.

Q. Where were you at in the reformatory?

A. Fairfield.

Q. Lancaster, Ohio?

A. Yes, sir.

Q. Now, you're facing also charges now. That's why you're in the county jail, is that right?

A. Yes, sir.

Q. And you indicated you were--when were you incarcerated for those charges?

A. January 25th.

Q. Of what year?

A. '85.

Q. Okay, this year. Now, when you were first [2515] in the county jail, who was your roommate? Did you have a roommate?

A. Ann older gentleman and some other guy. I don't know them.

Q. You don't know who they were?

A. No, sir.

Q. At a later time did you have occasion to have Dan Wesley as a roommate?

A. Yes, sir.

Q. And when would that have been?

A. Approximately--I was took over to the county jail on January 28th. I was over there approximately a week and a half, two weeks before I was moved in with Dan Wesley.

Q. Now, is Dan Wesley in the courtroom today?

A. Yes, sir.

Q. Can you point him out, please?

A. Yes, sir. Right there.

Q. How's he dressed?

A. Brown suit.

MR. PLUMMER: Your Honor, may the record reflect the witness has properly identified the defendant Clyde Daniel Wesley?

THE COURT: Very Well.

BY MR. PLUMMER:

[2516] Q. Now, you indicated you were in the county jail a week to two weeks before you were moved in with Mr. Wesley, is that right?

A. Yes, sir.

Q. Did you then have some conversations with Mr. Wesley in that he was your roommate?

A. Yes, sir.

Q. And what did you then initially begin talking about?

A. The first--within the first four or five days we just talked a little bit about my case and what I was in there for and I was asking him a little bit about what he was in there for.

Q. And did you tell him what you were in there for?

A. Yes, sir.

Q. And that's the two charges you've alluded to, is that right?

A. Yes, sir.

Q. And did he--you indicated there was some conversation about what he was in there for, is that right?

A. Yes, sir.

Q. And can you tell us about that conversation?

A. Well, within the first four or five days, you [2517] know, we talked about my case and then after we talked about mine he started telling me that he was in there--what he was being charged for and everything.

Q. What did he tell you he was being charged for?

A. With the murder and attempted murder and robbery of the Stouts.

Q. What did he tell you he was being charged for?

A. With the murder and attempted murder and robbery of the Stouts.

Q. Okay, now my understanding you were--when this incident occurred on May 14, 1984, you would have been in prison, is that right?

A. Yes, sir.

Q. Out of this county?

A. Yes, sir.

Q. Go ahead. Tell us how did the conversation about what he was in there for, how did that come up?

A. We just really started talking about--I asked him what he was in there for and he told me. Then I just started asking him questions about his, you know, what happened and everything.

Q. Had anybody ever told you to do that?

A. No, sir.

Q. Tell us what you talked about then.

A. Well, we talked about what he did. He said--I asked him, you know, what happened exactly [2518] what happened. He told me what happened.

Q. What did he say happened?

A. He said that him and a guy by the name of Stumpf and a guy by the name of Stretch----

Q. Do you know Stretch's name?

A. His real name, no, sir.

Q. He just said Stretch?

A. Yes, sir.

Q. Go ahead.

MR. PLUMMER: Can the jury hear?

THE JURY: Yes.

THE WITNESS: Okay, that him and Stumpf and Stretch, they came down to Cambridge and they was driving through and he told----

BY MR. PLUMMER:

Q. Did he say what road they were driving on?

A. No, sir.

Q. Okay.

Q. Then they came in Cambridge or out there at Muskingum county and they went into--they stopped the car and Stumpf and Wesley got out and they told Stretch to wait there, they was going over to this house.

Q. Okay, and that would be Stumpf and Wesley got out of the car. Is that what he told you?

[2519] A. Yes, sir.

Q. And did they say why? Did Wesley tell you why they had stopped?

A. Well, I guess him and Stumpf had planned on going over to the house to rob it.

Q. Did they say why they stopped at the particular place they stopped at?

A. No, sir.

Q. Tell us what in your best recollection tell us what Wesley told you.

A. Okay. He said that they went over to the house, Stout's house, and knocked on the door and said they needed to use the phone or something and they went into the house and once they got in the house they told him they was robbing him.

Q. Did he say who said that?

A. No, sir. And then he said that Stumpf was standing there holding the gun on them. He was standing there.

Q. Did he say--did Wesley tell you where that was in the house?

A. He just said one of the rooms. He didn't say exactly which room. And Stumpf--well, the man, Mr. Stout, I guess, he lunged at Mr. [2520] Stumpf and Wesley told him to shoot him. He shot him. I guess he fell down and then I guess Mr. Stumpf panicked, dropped the gun and Wesley picked up the gun and shot the lady. After he shot the lady I guess they was getting the rest of the stuff they was taking out of the house, they was going downstairs getting ready to leave. As they was turning to leave I guess they heard her moan or say something and then he said he turned around and shot her again.

Q. Who said he turned around and shot her again?

A. Mr. Wesley.

Q. Shot who again?

A. Mrs. Stumpf and then when they went downstairs---

Q. Mrs. Stumpf or----

A. Mrs. Stout.

Q. Wesley said he turned around and shot her again?

A. Yes, sir.

Q. Is that the words he used?

A. Yes, sir. And then they went downstairs, I guess through the garage to get ready to leave and the car that they had come in was already gone, so they took the Stout's car and headed back to Pennsylvania. I guess when they got [2521] back to Pennsylvania they met back up with Stretch and Wesley asked him what happened and he said he went to get gas and didn't have the money to get the gas so he took off.

Q. Stretch took off?

A. Yes, sir, from the gas station and Stretch told him that he was chased by a couple guys but he had shot the guys and killed them. Wesley said, are you sure you killed them and Stretch said to him, yes and then he said well, as long as you kill them. He goes, both the people in the house are killed. We don't have to worry about it. They won't make identity and then they went about their ways.

Q. Now, Mr. Eastman, going back to the incident back in the rooms that Mr. Wesley told you about, did he say Stumpf was watching Mr. and Mrs. Stout in one of the rooms? Is that what you said?

A. No. He said to me, he said that they was standing there and he had a gun on them and Stumpf had a gun on them. He didn't say which room, but he just said they was standing there.

Q. And then tell us what happened.

A. He said that the man, Mr. Stout, lunged at [2522] Stumpf, he said to shoot him. He shot--Stumpf shot Mr. Stout. Mr. Stout fell down.

Q. Did he say how many times that Stumpf shot?

A. No, sir.

Q. Go ahead.

A. And then after that happened Stumpf panicked, dropped the gun, Wesley picked up the gun and shot the lady, Mrs. Stout.

Q. Wesley said they----

A. Then they was getting ready to leave. He heard her moan or cry out or something, turned around and shot her again.

Q. Wesley said he went back and shot Mrs. Stout again?

A. Yes.

Q. Do you remember anything else that Mr. Wesley told you what happened in the house?

A. No, sir.

Q. Now, Jim, when did you tell this story to the Guernsey County Sheriff's office? Was it in March sometime?

A. About the 14th of March.

Q. Now, did Lt. VanHorn ever tell you or any member of the Guernsey County Sheriff's office or myself or Mr. Scott or any police [2523] officer every tell you to

engage in a conversation regarding this incident with Mr. Wesley?

A. No, sir.

Q. Did we ever make you any promises?

A. No, sir.

Q. Have we ever told you that we would be lenient on you on the charges that are pending?

A. No, sir.

Q. Back on the 14th , why do you think that--or earlier than that, when Mr. Wesley was telling you this, did he tells you why he was telling you this?

A. He said that at the time he never had no one else to really talk to that he thought he could trust.

Q. And he apparently thought he could trust you, is that right?

A. Yes, sir.

Q. Now, why did you got to the--who did you talk to at the Sheriff's office about this incident?

A. Mr. VanHorn.

Q. And why did you ask to see Lt. VanHorn?

A. Yes, sir.

Q. Why did you do that?

A. Well, I wanted to be moved out of the cell [2524] because a few days earlier he'd made--Mr. Wesley---

MR. BROWN: Objection.

MR. PLUMMER: Your Honor, I think he can testify as to why he----

THE COURT: Objection is overruled.

BY MR. PLUMMER:

Q. Go ahead.

A. A few days earlier Mr. Wesley was making a couple weapons and he had been talking about he wanted me to help him escape out of there and----

Q. What kind of weapons had he made?

A. Well, I only seen he made one. He had another one in there of a pop can that –it was ripped open and had sheets around it, it was made into like a shank.

Q. A knife?

A. Yea.

Q. Was it sharp?

A. Yes, sir.

Q. Did he ever say----

A. I didn't see him make that, but it was in there.

Q. Did he ever say anything about that?

A. He said that he goes on one occasion he said [2525] this would cut somebody's throat wouldn't it? I said, yes, sir.

Q. What other kind of weapons did he have in the cell?

A. He made an axe out of –okay, in the cell you got like steel bunks and the bottom of the bunks there's plates square like that and he bent off one of them and you got these things you clean the toilet with, he took the sponge thing off so he and the plastic handle and he had sheets tore up and he tied it all up and made it into an axe.

Q. Did he say anything like about that?

A. He said that would, you know, he could use that to go out the backdoor or through the wall or he could use that against one of the guards.

Q. You mean to chisel away at the wall?

A. Yes, sir.

Q. And when did you find out about those weapons, Jim?

A. Well, the first one, the one, the shank, the knife, I found out about that probably about like four or five days after I was in there he showed it to me. The other one it would [2526] have been closer to three maybe four weeks, because I sit there and watched him make that.

Q. Did he ever talk to you about escaping?

A. Yes, sir.

Q. What did he tell you?

A. I think he wanted me--he was trying to help me to get out on bond somehow so I could help him. He wanted me to steal a couple cars; come back into the Sheriff's Department; shoot the deputies, whoever was on; come back to his door; open it up; let him out; give him a gun. Then me have a gun and then---

Q. Did he tell you how he wanted you to dress or anything he wanted you to wear?

A. No, sir. He said--well, only thing he said about that was when I first come I he says, since they knew me there they'd probably let me right back in. Then after that when I come back to his cell I'd have to put on a mask so the inmates wouldn't see me.

Q. What did you say when he was suggesting all these things, Jim?

A. I just at first I was just listening to him and then one night he asked me to watch--this was after he made the axe, he wanted me to [2527] watch at the door for him because he wanted to go out through the back and I said----

Q. Now, what do you mean out through the back?

A. Out through the back wall. He wanted to chisel out through the back wall and escape back there and I wouldn't watch for him and he got--he seemed to get mad at me and he said, well, I see you ain't going to be able to be any help and he sat down on his bunk and just stared at the wall. The next day is when I went to Mr. VanHorn.

Q. Did that concern you a little bit?

A. It concerned me a lot.

Q. Were you concerned for your personal safety?

A. Yes, sir.

Q. Did you sleep that night?

A. No.

Q. That next day, what did you do?

A. I went to Mr. VanHorn and told him about the weapons in there and about what, you know, Wesley and me had talked about and I asked him, I said, move me out of there and the following day he moved me.

Q. Now, was there a shake-down at the cell?

A. Yes, sir.

[2528] Q. A shake-down, I mean, was there a check inspection?

A. yes, sir.

Q. And what was found then?

A. Okay. In my cell they found the axe; they found the pop can that was made into a knife; some rope, a jump rope; a pair of num chucks. I can't explain what they are.

Q. What were they made out of?

A. Out of paper.

Q. Did he make them or did you make them?

A. He made them.

Q. When did he make them?

A. I don't know when he made them for sure.

Q. What did they look like?

A. They're what they are they're like a weapon. May I?

Q. Sure.

A. Like /it would be this cut in half. They'd be even, then a rope in between them and you turn them around, they're used in martial arts.

Q. Jim, has anybody ever offered you any deals to testify?

A. No, sir.

Q. And is what you have said here in front of this [2529] Judge and in front of this jury has that been the truth?

A. Yes, sir.

Q. And the things that you told us that Mr. Wesley said, in fact, is that what he said to you?

A. Yes, sir.

MR. PLUMMER: No Further questions.

THE COURT: Mr. Brown.

MR. BROWN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BROWN:

Q. Mr. Eastman, what's your date of birth?

A. July 15, 1961.

Q. When did you turn 18?

A. That would be about----

Q. July 1979?

A. Somewhere around there.

Q. Well, if you had----

A. I'd have to figure it out.

Q. If you add 18 to 1961, don't you come up with 1979?

A. Yes.

Q. Would that be right?

A. I'd have to figure it out, yeah.

Q. Now, Mr. Plummer asked if you have a prior record [2530] you indicated that you had a grand theft charge. It was--was it officially called grand theft,

subsequent offense of November of '83? November 8th of '83?

A. Yes, sir.

Q. And you also have a robbery charge, don't you, October 31, 1980, felony in the second degree?

A. Well, on that charge there I ain't so sure. It's been like five to six years ago and I wasn't sure if I was really charged or not.

Q. Oh, I see.

A. I remember being put on probation but I don't remember being actually charged with robbery.

Q. So, you just got put on probations and never charged with anything then?

A. Well, like I said, it's been five or six years ago. I ain't sure.

Q. Yeah, but you didn't tell us that before. You didn't tell us about the robbery charge. You just told us about the other one.

A. You never asked.

Q. But in fact you've got both of those, don't you?

A. Well, like I said, the robbery I ain't sure if I was 17 or 18.

Q. Well, if it has October 31, 1980 as the date [2531] of it and you're 18 years old in 1979, that would sure make you over 18, wouldn't it?

A. Yes, sir.

Q. Then the next one you came up with was the grand theft and you got sent to prison for that one.

A. Yes, sir.

Q. And you got paroled?

A. (Witness nodded in the negative.)

Q. You just got let out?

A. (Witness nodded in the affirmative.)

Q. You're not on parole?

A. (Witness nodded in the negative.)

Q. You indicated you got released December 19, 1984?

A. Yes, sir.

Q. On that charge?

a. Yes, sir.

Q. And you're back in the county jail on January 25, 1985?

A. Yes, sir.

Q. Mr. Plummer asked some questions about that and you were there for burglary and a theft.

A. Yes, sir.

Q. Now then, while you're in the cell with Dan [2532] Wesley, isn't it true that you were on at least two occasions and possibly more taken out of that cell to ask whether or not you had gotten a statement from Dan Wesley?

A. No, sir.

Q. Lt. VanHorn never did take you out of there and say to you, ask you if you had a statement--took a statement from Dan Wesley?

A. No, sir.

Q. Did you--isn't it true you went back to the cell each time that you were out of the cell and told Dan Wesley that someone was trying to see if he had made any statements to you?

A. No, sir.

Q. You never disclosed that?

A. No, sir.

Q. You understand you're under oath?

A. Yes, sir.

Q. Have you ever acted as an informant for the police before?

A. Yes, sir.

Q. And when was that?

A. About a month ago.

Q. That's the time you set up Mattie Thompson and you set up Pitman--Ricky Pitman when you [2533] stood on one end of the phone and you had the police call while you're there and they're listening in too, set somebody up on a burglary charge?

A. Yeah.

MR. SCOTT: Objection to the phraseology, he set somebody up.

THE COURT: Objection is overruled.

BY MR. BROWN:

Q. That's right?

A. Would you repeat the question?

Q. Sure. That's when you set Mattie Thompson up and you set up Ricky Pitman by being at the Cambridge Police Department holding on the receiver while they listened on the other end to set them up on a burglary charge?

A. They asked me to.

Q. Pardon me?

A. They asked me to.

Q. And you weren't charged in relation to that?

A. No, sir.

Q. You were brought in for that and you set them up, but you didn't get charged for it?

A. No, sir.

Q. Now then, Pitman and Thompson were in the jail [2534] at the time that you were there from January through march, weren't they?

A. Yes, sir.

Q. And they were back in the tank, back in the bull pen, so to speak?

A. Yes, sir.

Q. You didn't want to be back there because you and set them up, right?

A. Yes, sir.

Q. And they've also told you when yon go back to prison they're going to make sure you get yours for doing that, didn't they?

MR. SCOTT: Objection, Your Honor. I think he's pursued it far enough on those lines.

MR. BROWN: Your Honor, I think this is wide open.

THE COURT: You may ask the question. Objection is over-ruled.

THE WITNESS: Repeat the question.

BY MR. BROWN:

Q. They were back there in the tank. You wanted separated from them because they told you that they were going to get you for setting them up.

A. Yes, sir.

Q. So you were in another part of the cell, another part of the jail. You got separated?

[2535] A. Yes, sir.

Q. Who separated you?

A. Peanut.

Q. Did Lt. VanHorn know you were separated for that purpose?

A. I don't know.

Q. You don't know? Peanut's the only one who separated you?

A. That's who I told. I told Peanut the day I come in there. That's the person I went to.

Q. So, right now as Mr. Plummer advised or questioned you, you have a burglary charge and also a grand theft pending against you?

A. Yes, sir.

Q. And you've also been sentenced once before. You went up on the grand theft and probation on the robbery

went up on the grand theft and you're facing these two charges now.

A. Yes, sir.

Q. You don't want to go back, do you?

A. No, sir.

Q. Are you concerned about what Pitman and Mattie Thompson may be waiting for you up there since they were already shipped?

A. I think I could handle whatever situation [2536] might occur.

Q. But you couldn't handle over here. You want[illegible] separated from them because you were afraid of them.

A. Why prevent trouble when it can be prevented.

Q. Okay. Now, with respect to the questions th[illegible] you had or the conversation you had with Dan Wesley, I want to ask you specifically about those. You moved into the cell with Mr. Wesl[illegible], you've been there for several days and you started talking about your case.

A. Yes, sir.

Q. All right. In fact, Dan was helping you with your case, wasn't he talking about your case and reviewing some things with you?

A. Yes, sir.

Q. He had one of the code books, the Criminal Code books that I had provided him to read?

A. Yes, sir.

q. And he had that at that time. He was trying to help you as a friend, is that correct?

A. Yes, sir.

Q. And you indicated in response to Mr. Plummer's question that you thought this was--you thought that Wesley thought you were somebody he could [2537] trust?

A. Yes, sir.

Q. You were suppose to be a friend?

A. Acquaintance.

Q. Now then, specifically when Mr. Plummer asked you to tell what happened you indicated that Mr. Wesley and Mr. Stumpf were standing together and that--and that Stumpf panicked.

A. After Mr. Stout lunged.

Q. Mr. Stout rushed him?

A. Yes.

Q. So, your testimony is they're standing together there when he rushed him and Stumpf shot him?

A. Yes, sir.

Q. And that's what Dan told you?

A. Yes, sir.

Q. Did he tell you were this took place?

A. No, sir. In one of the rooms.

Q. Pardon me?

A. He just said one rooms.

Q. Isn't it a fact, Mr. Eastman, that Dan Wesley was talking to you about Stumpf's case because he had notes from the Stumpf's transcript in front of him and he was talking to you about what Stumpf had said took place and how Stumpf [2538] had given several different stories and he was talking to you about Stumpf's case and not what he did but what Stumpf did?

A. No, sir.

Q. You're under oath, you understand that?

A. Yes, sir.

MR. PLUMMER: Your Honor, I believe the witness understands he's under oath. I would object to that question.

THE COURT: Objection is overruled.

BY MR. BROWN:

Q. With respect tot his information that you had in the jail cell about the johnnie mop handle, you were

talking about in fact you took the bristles out of that johnnie mop handle, didn't you?

A. No, sir.

Q. You removed the head of that johnnie mop handle at the time you guys were working around in the jail?

A. No, sir.

Q. In fact, you were the one that wanted to break through the wall?

A. No, sir.

Q. All right. Are you aware you indicated Mr. [2539] Wesley wanted to go out through the back way to escape out the back?

A. Repeat that.

Q. You indicated Mr. Wesley wanted to escape out the back of the cell.

A. Yes, sir.

Q. You're aware that that's lighted back there and there are cameras back there, aren't you?

A. Yes, sir.

Q. Now, this marital arts things that you described that was made out of some sheets and a piece of toilet paper, wasn't it? It was made out of paper?

A. It was made out of newspaper and sheets.

Q. But you held up a piece of wood.

A. Just to indicate what it was like.

Q. But it was made out of toilet paper.

A. No, sir.

Q. And newspaper.

A. Newspaper, yes.

Q. What did you do with the head of the johnnie mop when you took it off the handle?

A. I never took it off the handle.

Q. Isn't it true you hid it behind the radiator?

A. No, sir.

[2540] Q. Now, you're looking for leniency on this case from the prosecution, aren't you?

A. I hope they took in regard.

Q. You're looking for them to take into consideration all the help you've given them today, isn't that right?

A. I hope they will.

Q. Okay. In fact, you've--you wanted your attorney to give you county time for this, don't you?

MR. SCOTT: Objection. The disposition--he answered the question.

THE COURT: I'm going to overrule the objection.

THE WITNESS: Repeat the question.

BY MR. BROWN:

Q. You've asked your attorney to secure county time instead of prison time for you.

A. I said I would like to have county time.

Q. Do you recall talking to Mark Graham several days ago?

A. Could have.

Q. Do you recall telling him that you expect to go fishing with him this summer because you were going to be given county time and out?

A. That's if I--I ain't been found guilty on [2541] nothing yet, but I think I can beat the cases I'm in on.

Q. Did you say that?

A. To him?

Q. Yes.

A. Yes, sir.

Q. And did you tell him that your attorney was looking for county time?

A. Yes, sir.

Q. Just now you were saying you could beat those cases. So, what are you going to do county time for?

A. They could get me on one but they couldn't get me on another one.

Q. Plain and simply, Mr. Eastman, you do not want to go back to prison and you will do anything to keep from going back to prison, won't you?

A. Not anything, no, sir.

MR. BROWN: I have no further questions.

REDIRECT EXAMINATION

BY MR. PLUMMER:

Q. Did you ever hurt anybody in any of those crimes that you were convicted of?

MR. BROWN: I'm going to object. That has nothing to do with the cross-examination.

[2542] MR. PLUMMER: He brought up the issue himself, Your Honor, the issue of robbery.

THE COURT: I'm going to overrule it.

BY MY PLUMMER:

Q. Did you ever hurt anybody?

A. No, sir.

Q. And you pled guilty to those charges that you admitted to what you did, is that right in court?

A. Yes, sir.

Q. You came in here and told the Judge and admitted to him what you did, is that right?

A. Yes, sir.

Q. And nobody's offered you anything at all for testifying here?

A. Nothing at all.

Q. Have you told the truth before this Court and this jury?

A. Yes, sir.

MR. PLUMMER: I have no further questions.

MR. BROWN: I have no further questions.

MR. SCOTT; May we approach the bench, Your Honor?

THE COURT: Yes sir.

* * *

IN THE COURT OF COMMON PLEAS
IN AND FOR THE FIFTH DISTRICT
COURT OF APPEALS, GUERNSEY
COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff,	:	
vs.	:	CASE NO. 9692
CLYDE DANIEL WESLEY	:	
Defendant.	:	PART III

Transcript of the Proceedings held on April 8, 9, 10, 11, 12, 15, 17, 17, 18, 22, 23, 24, 25, 26, 27 and May 2 and 6, 1985 before the Honorable John E. Henderson, Judge.

APPEARANCES:

C. Keith Plummer
James R. Scott
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH

For the State.

Donald D. Brown
Sam R. Raptis
Attorneys at Law
Guernsey Savings & Loan Bldg.
Cambridge, OH

For the Defendant.

FILED COMMON PLEAS COURT
1985 DEC 2 AM 9:02

[illegible]
CLERK OF COURTS
GUERNSEY COUNTY

* * *

[3023] all throughout the trial and since this is still a part of the procedure I want you to be just as attentive as you have been in the past both to the State and to the defense.

Gentlemen, are you ready to proceed?

MR. SCOTT: State is ready, Your Honor.

MR. BROWN: Defense is ready, Your Honor.

THE COURT: Mr. Scott or Mr. Plummer, you may proceed.

MR. SCOTT: Thank you, Your Honor.

May it please the Court, gentlemen of counsel and ladies and gentlemen of the jury. As the Judge indicated to you yesterday, you have now heard all of the evidence you will ever hear in this case before you are asked to decide. There remains only two things yet to be done before this case is finally submitted to you for deliberation and your verdict. First these arguments by the attorneys for both sides.

As the Judge has mentioned, by reason of the law, the provisions of the law and the fact that the State of Ohio in this case has the burden of proof, which we've talked about, the State is given the opening and closing portions of the final arguments and the defense [3024] has the middle portion.

Now, as Judge Henderson has mentioned to you also, what we say in these final arguments are not items of

evidence and they should not be considered as evidence. The evidence in this case, as you've been told time again, are the exhibits which have been admitted into evidence and the testimony of the various witnesses from the witness stand. The arguments are designed to assist you in understanding and evaluating the evidence which has been presented. It is our opportunity to tell you what we believe the evidence has shown as presented in this case and what inferences, if any, may be drawn from the evidence.

Now, recall if you will, sometime ago when we gave opening statements in this case at that time we gave you a preview or perhaps for lack of a better word, an advanced birds-eye view of the overall factual picture we expected to develop by the evidence as it's presented. You have since then heard the evidence. You've heard it from the various witnesses, the stipulations which were read to you which are agreed facts between the State and the defense and [3025] the testimony of the various witnesses as it came to you in bits and pieces. These final arguments are now our opportunity to try to pull this back together for you. That is, to put the pieces of this picture, if you will, into place and to give you the overall picture we feel has been proven by the evidence in the case.

As we've mentioned at the outset and has been mentioned from time-to-time, the indictment in this case charges five separate crimes. Each is referred to as a count. The first count, second count and so forth. I reviewed for you at the time and read to you the verbatim language in the indictment and I do not propose to do that at this time. The five charges, sufficient to say, are aggravated murder in count one with specifications; count two, attempted aggravated murder with a firearm specification; count three, aggravated robbery with a firearm specification; count four, grand theft of a motor vehicle and count five, grand theft of a firearm. As was mentioned to you far back as the voir dire,

which seems quite some time ago when you were being selected, [3026] each of these crimes is separately charged and each of these crimes should be separately considered by you in deliberating on the evidence in this case.

Now, as I say, I do not wish to go back and read the indictment to you but if you will recall at the time of our opening statements I mentioned to you the various elements or parts of each of the crimes charged in the indictment and each of which elements the State is required to proved beyond a reasonable doubt in order for the jury to find the defendant guilty of that particular crime. I would like to review once again for you in order to bring it back into your mind the elements of these crimes charged in the indictment. Before doing that, though, I would say that this case in addition to other somewhat unusual circumstances has one particular circumstance which is unusual in that three of these crimes are not disputed. That is, that the defendant has on the witness stand, himself, admitted his guilt to three of the five crimes charged in this indictment.

The third count being the offense of [3027] aggravated robbery, the substance of which is that the defendant while committing a theft offense, that is, while stealing property was armed with a deadly weapon. He has admitted that fact or those facts and the specification the firearms specification to the third count of aggravated robbery, that is, that the deadly weapon he had on his person at the time of that offense was a firearm. He has admitted that.

With regard to the fourth count and the fifth count--the fourth count in the indictment being grand theft of a motor vehicle and the fifth count being grand theft of a firearm, the defendant likewise on that very witness stand has admitted his guilt to you that he stole a motor vehicle and that he stole a firearm, that is, that he took each of those

items of property without the voluntary consent of the owner and by threat. He has admitted these crimes to you so I wouldn't think you would have any difficulty in reaching your verdicts of guilty as to those three crimes charged in the indictment.

However, there are, as you are well aware, two additional crimes charged in this indictment. [3028] The first count and these are in dispute and not admitted by the defendant. The first count in the indictment charges the crime of aggravated murder and I'd like to review, briefly, the elements of the crime of aggravated murder as charged there. The elements of that crime which the State must prove beyond a reasonable doubt are as follow: (1) that on or about May 14, 1984 this defendant, Clyde Daniel Wesley, purposely; (3) caused the death of Mary Jane Stout; (4) while attempting or committing the crime of aggravated robbery, which I mentioned to you is committing a theft offense, while armed with a deadly weapon, in this case a handgun and (5) that this crime of aggravated murder took place in Guernsey County. Those are the essential elements of the crime of aggravated murder as charged in the first count in this indictment.

There are specifications to the first court in the indictment, the aggravated murder charge. Specification one charges that the crime was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the defendant in this case, [3029] aggravated robbery, theft while armed.

Specification two charges that the aggravated murder was part of a course of conduct involving the purposeful killing or attempting to kill two or more persons, in this case Mary Jane Stout and Norman Stout.

Specification three charges that the aggravated murder was committed while the defendant was either committing, attempting to commit or fleeing after committing or attempting to commit the crime of aggravated robbery; and then this is different, that the defendant was the principal offender.

Please note that there is no language in specification one or specification two but only in specification three that the defendant was the principal offender. We'll talk about that somewhat later but keep that in mind and finally, specification four which we refer to as a gun specification, again charges that the defendant had a firearm on or about his person or under his control while committing the offense of aggravated murder.

Those are the four specifications to the charge of aggravated murder as set forth in the [3030] first count in the indictment.

Now, the second count in this indictment charges the offense of attempted aggravated murder and the elements of that offense are as follows: that (1) on or about May 14, 1984, this defendant Clyde Daniel Wesley; (3) purposely attempted to cause the death of another person, Norman Stout; (4) while the defendant was either committing, attempting to commit or fleeing immediately after committing or attempting to commit the crime of aggravated robbery and (5) once again that that offense attempted aggravated murder was committed in Guernsey County.

There is one specification to the attempted aggravated murder charge again being a firearm or gun specification that the defendant had a firearm on or about his person or under his control at the time he committed the offense of attempted aggravated murder. It's the same type of gun specification

that I just read as specification four to the aggravated murder charge in count one.

Now, these are the essential elements of the two crimes which are really in dispute in [3031] this case aggravated murder in count one, attempted aggravated murder in count two and the details or elements of the specifications to those two charges.

Now, because of the nature of these charges and because the indictment does include specifications to each of the two disputed charges, I believe we should discuss briefly what decisions and what procedures you will be required to take in considering each of these two charges.

Now, the first count being aggravated murder your first job will be to consider the evidence and to determine whether or not the State has proven beyond a reasonable doubt each of the elements of the crime of aggravated murder as I've given them to you. If you find that the State has in fact sustained its burden of proof and has proved each element of the crime of aggravated murder beyond a reasonable doubt your job is not quite finished as to that first count because you must then move on and consider the specifications that I've talked about. You must then consider first the specification one to the first count, being the [3032] specification that the crime was committed to avoid detection, arrest and so forth and consider and determine whether or not the State has proven by the evidence beyond a reasonable doubt that that in fact is true. If you find the State has proven beyond a reasonable doubt the truth of the allegation in specification one then you should return a guilty verdict as to specification one. You should then proceed with specification two and specification three in the same manner, each of those three specifications which are referred to as aggravating specifications are separate and unto themselves, separate from the other two and shall be considered

separately and determined by you separately without reference to your decision with regard to any of the other three specifications.

Specification four requires your consideration to determine whether the State has proven beyond a reasonable doubt that the defendant had possession of a firearm at the time he committed the offense and again if you find that to be so you should return a guilty verdict as to the firearm specification to count one, [3033] which is specification four. As I've mentioned, each of these specifications is separate to itself and should be considered by you separately without reference to your decision of any other specification.

Moving to the second count or the attempted aggravated murder count, again your first job is to weigh and to consider all of the evidence in this case, apply the law as the Judge will give it to you after we finish these arguments, determine if the State has proven each of the elements of the crime of attempted aggravated murder beyond a reasonable doubt. If you find the State has in fact proven each element of the crime beyond a reasonable doubt your verdict must be guilty. However, then you still have another job to do with regard to this second count, the attempted aggravated murder, you must then consider the firearms specification.

Again, if you find that the State has proven beyond a reasonable doubt at that time defendant had in his possession or under his control a firearm when he committed the offense of attempted aggravated murder you must return [3034] a verdict of guilty of that specification. These are the considerations and the decisions you will be required ultimately to make with respect to the aggravated murder and the attempted aggravated murder charge. Let's look at the facts in this case. Again, this case is unique to some degree with regard to the facts because many, many of the facts in this case are not disputed. And I do not propose to rehash for

you in detail the testimony of all the witnesses brought to the stand for the State because you heard that evidence. You can recall that evidence as well as I and you can fairly well see where that evidence fits into the overall picture. However, I do wish to mention to you certain facts that I believe are not disputed in this case.

One, that Mary Jane Stout was in fact shot to death in a bedroom of her home the night of May 14, 1984, and she was shot four times. Two, that at the same time and place her husband, Norman Stout, was shot twice in the head once between the eyes and a second time in the top of the head.

[3035] Three, that this defendant, Clyde Daniel Wesley and John David Stumpf went to the Stout residence that night for the express, joint and common purpose of committing a felony of stealing a motor vehicle to be used in a later gas station hold-up.

Four, that when this defendant and Stumpf went to the Stout residence that night each of them was armed with a loaded firearm, each being a loaded 25 caliber automatic pistol. Stumpf having a 25 caliber chrome colored Raven pistol belonging to Norman Leroy Edmonds and Wesley having the 25 caliber black automatic pistol which he owned and which he regularly carried and which is in evidence and identified by him and by others as State's Exhibit "N".

Five, that Stumpf and Wesley used the subterfuge that they had car trouble and needed to use a telephone as a means to gain entrance into the Stout residence.

Six, that after both Stumpf and Wesley had drawn their guns on Mary Jane and Norman Stout in the residence and inquired about motor vehicles that this defendant, Wesley, thereupon searched the house particularly the [3036] bedroom areas, particularly bedroom number "1" where he

found assorted, handguns, long guns and ammunition which Mr. Stout owned and had stored there and upon discovering those items the defendant decided to steal those items as well.

Seven, that one of the guns that Wesley discovered in that closet and decided to steal and did in fact steal was a 357 Smith and Wesson magnum revolver owned by Norman Stout and which is in evidence as State's Exhibit "S".

Eight, that at sometime after the two of them entered the Stout residence Mr. and Mrs. Stout were escorted from the kitchen area down the hallway at gun point to bedroom number "2" that Mrs. Stout at one time was seated on the bed, Mr. Stout was standing next to the bed further away from the hall doorway.

Nine, that John David Stumpf stood in or near the doorway to bedroom number "2" holding Mr. and Mrs. Stout at gun point while Wesley searched through the closet in bedroom "1" across the hall gathering up guns and ammunition to steal.

Ten, that as he was being held by gun [3037] point by Mr. Stumpf. Norman Stout noticed that Stumpf was becoming nervous and he was afraid for his wife's safety.

Eleven, that he decided to approach or rush Stumpf in an effort to get Stumpf out of the bedroom, that is, bedroom number "2" where his wife was and to perhaps give her a chance to close the door or otherwise go to safety.

Twelve, that Mr. Stout approached Stumpf and as he did so he was shot by Stumpf twice, once between the eyes and once in the top of the head causing Mr. Stout to fall to the floor in bedroom number "1" across the hall.

Thirteen, that the two shots which struck Mr. Stout in the head and the four shots which struck the person of Mary Jane Stout, including the two fatal shots to the head, were all fired from the same gun being consistent with a 25 caliber chrome colored Raven which we do not have but which is similar in appearance to the chrome colored Raven gun in evidence as State's Exhibit "N-l".

Fourteen, that Mr. Stout recalls as he lay on the floor of bedroom number "l" after being shot hearing a conversation between two [3038] male persons followed shortly thereafter within less than a minute by four loud reports which he now believes to have been gun shots.

Fifteen, that one shot was fired by Wesley's black 25 caliber automatic, Exhibit "N" which lodged in the mattress in bedroom number "l" and the track of the bullet in the mattress indicated to have been fired from the general direction of the doorway to that bedroom and the bullet taking a downward track into the mattress. That bullet is in evidence as State's Exhibit "J".

Sixteen, that after both Norman Stout and Mary Jane Stout had been shot Wesley continued to gather up the guns he wanted to steal and and thereafter both he and Stumpf went to the garage and stole a red 1976 Plymouth automobile owned by Mary Jane Stout, which was in the garage area and which they later drove back to Pennsylvania and on the 16th of May, I believe it was or 15th perhaps, they eventually abandoned that vehicle in an isolated area over a bank some fifty miles from Washington, P. A. after attempting to wipe all fingerprints out of the vehicle.

[3039] Seventeen, that on May 16, 1984 Wesley sold the 357 magnum revolver owned by Norman Stout and which he had stolen from the Stout residence on the 14th to one John Dino in Canonsburg, Pennsylvania and that this

gun, the 357 magnum revolver is in evidence as State's Exhibit "S".

Now, this in my opinion, these in my opinion are the facts in this case which are not disputed.

Now, there are certain areas of disputed facts in this case where the evidence is in conflict but I would say to you that the area of dispute and the time span which is a dispute the events involved in this case, the time span of the disputed events are very small.

It starts at the moment Norman Stout decided to rush Stumpf and through the next few minutes thereafter during which both Norman Stout and his wife were shot to death. These are the disputed facts. You've heard the testimony how that all the evidence was gathered from Texas, from Pennsylvania, the crime lab evidence and all of those things, those all have a place in this trial to prove these [3040] charges but when you get right down to it what is disputed is what happened during those few moments from the time the shooting started until it finished in the residence of Mr. and Mrs. Stout. I submit that if you consider this dispute, the disputed evidence, I believe it can be narrowed down to basically three questions.

One, who actually shot and killed Mary Jane Stout, was it Clyde Daniel Wesley or was it John David Stumpf?

Two, did this defendant, Clyde Daniel Wesley, at any time during the course of these events at the Stout residence have a purpose to kill anyone?

Three, even if there's doubt as to whether or not Clyde Daniel Wesley did not personally fire the fatal shots which killed Mary Jane Stout or the shots which wounded Norman Stout, is he nevertheless guilty as an aider and

abettor of the crime of aggravated murder and attempted aggravated murder because he entered into a common scheme or design with John David Stumpf in the commission of the offenses and participated in the commission of the offenses? [3041] It's called an aider and abettor, we'll talk about that a little later.

It seems to me those are the three questions which are disputed in this case. Now, before we talk about the evidence which goes to those three, as I see them, disputed principle issues in this case, I'd like to talk a little bit about the credibility of witnesses and what your job is when the evidence is in conflict.

As we've told you time and again in this case, the jury decides the facts from the evidence; decides what facts have been proven by the evidence. You are called the trier of fact in this case. The Judge considers matter of law, the jury decides matter of fact. In this case as in any case where the evidence is in conflict to some degree and where there are differences in the testimony it becomes your job to resolve those differences. It becomes your job to decide what evidence you choose to believe and what witnesses you choose to believe. In order to decide that you must determine the credibility of the witnesses whose testimony is in conflict with that of others. [3042] Now, in order to do that as the Judge will instruct you, there are a number of things which you may consider in determining the credibility of a witness, the demeanor of the witness as you observed him on the witness stand, his candor or his reluctance to testify, his bias or prejudice, his interest in the outcome of the case, whether he was in a position to see and hear those things about which he testifies or any other matters which go to his truthfulness. Now, after the Judge says all of that and after I say all that, it really boils down to your collective and individual good common sense and good judgment as to what witnesses are believable and what witnesses are not. Now, the Judge will

go into that in more detail as to those matters that you should take into account, that you choose to in determining what witnesses are worthy of belief.

Now, let's look at the three disputed basic questions as I've mentioned them to you and relate those questions to the evidence in this case. Now, I won't attempt to insult your intelligence by saying that this record [3043] is crystal clear and without discrepancy or difference on the testimony because it's not so. There are discrepancies, there are conflicts in the testimony. I would simply caution you that these are the things that you must resolve in attempting to decide the issues, the basic issues in this case. I should caution you, I believe, that in any case where we have a number of witnesses we had today or in this case over the last several days relating to events which happened some eleven months ago there are bound to be minor discrepancies in the recollection of those several witnesses. You've all probably heard that experiments have been done where spontaneous action takes place in a classroom, for example, if someone runs in and shouts something and fires a gun and so on then the members of that class are asked to write down exactly what they recall just within a few minutes. There will be differences. People observe and notice things in different perspective then others so there are bound to be minute or discrepancies and to that extent conflicts in the testimony of a case of this nature. I would simply caution you that do not [3044] be led into blind alleys by minor discrepancies in the testimony. The discrepancies that I'm talking about that you've really got to wrestle with are those discrepancies that go to the heart of the case, that is, the central basic issues you need to decide. Let's now talk about those.

First, who actually shot Mary Jane Stout? The State offered the testimony and we told you in our opening statement that we would offer testimony that this defendant shot Mary Jane Stout after John David Stumpf shot Mr.

Stout, panicked and dropped the gun. The State offered the testimony of James Eastman. Now, James Eastman is not a pillar of this community. He is an admitted previously convicted criminal. He is presently an inmate of the Guernsey County Jail awaiting trial on charges pending against him. Be that as it may, he testified that as he was living, if you will, living with this defendant in the same cell that this defendant talked to him about this case, perhaps misplaced confidence in Eastman, but in any event Eastman told you from the witness stand what this defendant told him about what happened [3045] at the Stout residence the night of May the 14th of 1984. Recall, if you will, Eastman said that Wesley told him that Stumpf shot Mr. Stout, that Stumpf dropped the gun and panicked that he, himself, Wesley, picked up the gun and shot Mrs. Stout and as he was beginning to leave he heard her moan or cry out and went back and shot her a second time; that they went over to Pennsylvania, met up again with Stretch Edmonds; Edmonds made a comment to him that he had shot somebody at a gas station and this defendant said, well, that's alright the two people in the house are dead, I didn't leave any witnesses That was the testimony of James Eastman.

The defendant, Wesley, took the stand and as you heard, he denies this. The same sequence of events but he says Stumpf did the shooting. Why should you believe Eastman? You may not like James Eastman and maybe I don't like James Eastman but the question is not whether we like him. In any case you take your witnesses where you find them. If you could start out ahead of time and pick who you wanted to testify in a case you would choose [3046] substantial citizens but that's not the way the world goes around. Substantial citizens usually aren't in a position very often to be witnesses to a commission of a murder. The question really is not whether James Eastman is a criminal, it's a question did he tell the truth. Did he tell the truth when

he told you what Wesley had told him when they were cellmates and when they had each other confidence.

Now then, consider on the other hand the credibility of the defendant who denies that he shot Mary Jane Stout. Who has the most at stake in the outcome of this trial? I submit it's the defendant. Who is the most vitally interested in the defendant's acquittal of the charge of aggravated murder and attempted aggravated murder? It's this defendant. He has cleverly admitted to you the three lesser charges in this indictment in an effort to support the argument that I have admitted the extent of my wrongdoing but now I'm denying to you the two more serious charges to give strength to that denial. I submit to you the defendant had very little choice in admitting those three lesser charges because he knew we [3047] had him cold.

The gun that was recovered from his person of his bedroom in Texas, State's Exhibit "N", matched a bullet fired into the mattress of bedroom number "1". He was identified by Mr. Stout and by Edmonds as being one of the two persons who went to that house that evening of May 14. He sold a gun, the 357 magnum revolver from that house to John Dino. We found the gun. So, given all of that, how could he deny being there? How could he deny that he was armed and how could he deny that he stole something? So, he admitted that. He admitted those three crimes, theft of the motor vehicle, theft of the firearm and aggravated robbery, to give strength and credence to his denials that when I do--the argument is going to be, I can foresee it, I've admitted my part when I do wrong. I admit it, but I'm denying the rest. But consider, if you will, his position in this trial as to his credibility. Who has the most motive, if you will, to twist the facts to get himself off the hook?

On the same question, though, I'd like to point out to you that the testimony of Norman [3048] Stout, himself, has

some significance in my judgment. You will recall that Norman said as he rushed Stumpf he was shot, the last he saw at that moment was that his wife was seated on the bed, that he knocked Stumpf across the hall and into bedroom number "1". He doesn't recall at what point exactly he received the second shot but he recalls being on the floor after he regained his senses to some extent, he heard a conversation between the two male persons and then heard four reports that he now believe were gun shots. Mary Jane Stout was shot four times.

Now, is that consistent with what Wesley would have you believe? His testimony was that he was rummaging through the closet gathering up the guns he was going to steal in bedroom number "1" when he heard rapid fire and then Mr. Stout confronted him and that the second shot of Mr. Stout was fired in that bedroom number "1" that he didn't bother to look in bedroom number "2" from where those shots had apparently come he described but as they were leaving he looked in that bedroom number "2", saw Mary Jane Stout lying on that bed already [3049] shot when he says Stumpf went back into shoot her the second time.

The order of the shootings is important for you to determine. If you believe Norman Stout's version who was shot first and when those final four shots were fired, Wesley's not telling it the way it was. So, I say to you that Norman Stout's testimony corroborates the version of the facts of how these shootings occurred more so then Wesley and it does in fact corroborate what Wesley told Eastman, that Stumpf shot Mr. Stout, panicked, he dropped the gun and then this defendant shot Mrs. Stout. They had a conversation, if you believe Mr. Stout, and then the four shots were fired.

Why should you believe Norman Stout? Because he has nothing to tell you, no reason to tell you anything other than the truth of the tragic event in his life that he has no

particular reason to point the finger at any one particular person other than to tell you the truth.

Now, having gone through all that, I say there is ample evidence in this case from which [3050] you could conclude beyond a reasonable doubt that this defendant did in fact fire the fatal shots into the body of Mary Jane Stout.

Let's move on to what I consider to be the second disputed basic issue in this case. The question is one of the elements that the State must prove is that the defendant purposely or intentionally caused the death of Mary Jane Stout in order to prove aggravated murder or the attempted aggravated murder with respect to the wounding of Norman Stout.

First off, if you believe that the evidence has proven beyond a reasonable doubt that he fired the four shots into the body of Mary Jane Stout it seems to me you should have very little trouble finding out what his purpose was. I submit you can't argue that it was accidental discharge of the firearm when a person has been shot four times and he certainly wasn't intending to do her any favors, if he in fact shot her four times. I would say under those circumstances the purpose is very clear. But beyond that, Judge Henderson will instruct you, I believe, that purpose is a state of mind and since we can't look inside the head of an [3051] individual, particularly back at the time these events took place. What do we do to determine what his purpose was when those events took place? The only way we can determine the purpose an individual had in doing certain things while such certain events occurred is to look at what he did, how he went about it, the weapon or means used to do those things and all of the circumstances in evidence concerning those events as they relate to what was his state of mind.

Now, I think the Judge will also instruct you that you as the jury are permitted to draw an inference that a person intends the natural and foreseeable results of his voluntary acts. Now, let's look at it in that light. In this case both Stumpf and Wesley went to that house armed with a loaded firearm for the purpose of committing a felony, an unlawful act. Wesley admitted on the witness stand that it was foreseeable that under those circumstances that death or injury could result from the fact that they had those loaded guns. He admitted from the witness stand that those guns were for the purpose of subduing the [3052] people and terrorizing and coercing them into doing their will. When asked what was he going to do if they resisted he said, well--or to keep them from reporting the theft of the car to the police department, he said tie them up. Well, why didn't he? Did you hear any testimony at all about anybody trying to tie anybody or gag anybody or lock them in the bedroom or whatever? No, all you heard was that continuously one or the other of them, Stumpf or Wesley, had a gun on Mr. and Mrs. Stout. He testified he had his gun out at all times. He even shifted it from his right hand to his left hand as he gathered up the things he was stealing from the closet. It has been admitted that with those loaded guns they went there for the joint and common purpose to commit that felony, knowing someone was likely to get hurt or worse and another thing which I think has a considerable significance on his state of mind on the evening of May the 14th is the Belmont County incident. By his own admission he admitted that as they passed a car, a complete stranger at random, it could have been anybody, as they passed a car he pointed that [3053] nine millimeter automatic out the passenger's window, aimed it at the driver's window and fired the gun, again trying to say I didn't intend to hurt anybody. Does that make sense? If I submit to you that if I have a loaded firearm and I aim it at you and fire it, I'm not intending to do you any favors with that gun, does that not clearly indicate to you what his state

of mind was on May the 14th as he traveled to Ohio with guns?

Now, Judge Henderson will also instruct you in substance--I don't presume to quote him verbatim, that you may infer on the part of this defendant but are not required to a purpose to kill by reason of the fact that he and John David Stumpf entered upon a joint venture, a common scheme or design to commit a crime while armed and by violent means and the person is killed during the commission of that intended crime while they were armed, that you may infer from those circumstances a purpose to kill.

Now, in conclusion on that point, I would say to you that I believe if you fully and fairly consider all of the evidence in this [3054] case and you draw all of these reasonable inferences from that evidence as to what the defendant's conduct as revealed by the evidence reveals on the question of his state of mind at the time he did those things, I think you'll find an ample basis upon which you can conclude beyond a reasonable doubt that Clyde Daniel Wesley did act that night with a purpose to kill someone.

I believe the Judge will also instruct you that the purpose to kill under the foreseeability aspect, that is, foreseeable for someone to likely be killed he doesn't have to foresee the exact nature of the injury or the specific person as long as the situation and his conduct was such that it was foreseeable that a death or serious injury was likely to result. I think the Judge will talk to you about that.

Now, back to aider and abettor. I mentioned to you that even if you have doubt about whether or not this defendant Clyde Daniel Wesley fired the fatal shots into the body of Mary Jane Stout and it's clear that he did not fire those bullets into the head of [3055] Norman Stout that nevertheless he's been proven guilty of both of the crimes of

aggravated murder and attempted aggravated murder as an aider and abettor and is equally guilty as if he had fired those fatal shots.

Now, let me explain. I believe the Judge will instruct you that if two persons enter upon unlawful course of conduct, a common scheme or design and one person aids, assists, encourages or helps another person to commit those crimes then the person who aids and assists is equally guilty with the principal offender even though he did not commit each and every act to complete the crime.

Now, in this case if you find from all the facts and circumstances of this ease that that night at the Stout residence this defendant had a purpose to kill and that he with such purpose aided, assisted, helped or encouraged John David Stumpf to commit aggravated murder or attempted aggravated murder then Clyde Daniel Wesley is equally guilty as though he had fired the shots. In other words, although there is evidence, as we've talked about, from which you could conclude that he did fire [3056] the shots into the person of Mary Jane Stout nevertheless the State does not have to prove that in order for you to find him guilty of aggravated murder as an aider and abettor in the commission of that crime or those crimes. Now, this idea, this concept, this legal principle provision of the law of aider and abettor applies equally to the first and second specifications to the charge of aggravated murder.

All right. Let's put it together. Specification one says that the crime was committed in order for the purpose for avoiding arrest, detection, etc. of the crime of aggravated robbery. Putting the aider and abettor concept in there, if you find that he acted with purpose to kill then if he aided and abetted another person to purposely kill for the purpose of escaping detection then he's guilty of that specification. We

need not prove that he fired the fatal shot for him to be guilty of specification one.

Specification two says that the crime was committed during the course of conduct which involved the purposeful killing or attempting [3057] to kill two or more persons. Again, if the purpose to kill aiding, assisting, encouraged or helped another person to engage in a course of conduct involving the purposeful killing of two or more person or attempting to kill he is guilty of specification two whether or not he fired the fatal shot.

Now, specification three is different. Specification three requires that you find that he was the principal offender. That is, the specification that says that the killing was during the course of an aggravated robbery and that he was the principal offender but it is only as to specification three that you must find that he was the principal killer.

Now, did he participate in these crimes? Going back once again. Both of those people went there with loaded firearms. By his own testimony he restrained Norman Stout in bedroom number "1" to prevent him from having access to the guns on the bed which enabled, without any problem, Stumpf to shoot Mr. Stout a second time - physically restrained Norman Stout, held him. All right. He made no efforts to stop Stumpf from carrying out or [3058] completing the crimes. He made no effort to render assistance to either of the victims. Finally, there were two people with guns in that house, both guns were fired. Only one gun hit anybody but both were fired. Wesley's gun was fired in bedroom number "1", the bullet entered a downward path into the mattress. What was his story? He dropped the gun and picked it up off the floor but he never did fire it. You heard the ballistics expert that that bullet, Exhibit "J" I believe, was fired from Wesley's gun. If he dropped it on the floor it's impossible for it to enter that mattress on a

downward flight in the direction you heard it described. I believe Deputy McCauley said the track of the bullet was generally in this direction. The bed had not been ajar directly from the direction of the hallway door and in a downward flight into the mattress. There's no possible way that firearm could have accidentally discharged when it hit the floor at a level lower than the bed. So, if both of those people were in there shooting at people and trying their level best to hit them with a bullet, I submit to you [3059] they're equally guilty of the results of those shootings even though perhaps only one of them was successful in hitting anybody. They were both trying their level best.

I submit that at the very least the evidence proves that Clyde Daniel Wesley was an aider and abettor in the crime of aggravated murder because of his participation at least in the second shot by his own admission in the attempted aggravated murder of Norman Stout and as an aider and abettor under the law he's equally guilty the same as if he fired each of those shots into Norman Stout and each of those shots into Mary Jane Stout.

Now, I believe the Judge may instruct you that it makes no difference what disposition may be made of the Stumpf case, whether or not he was convicted as an principal offender or as an aider and abettor as to the results of your decision in this case.

If you find from the evidence in this case that he was either a principal offender, that is, Wesley, or an aider and abettor beyond a reasonable doubt then you should return a verdict of guilty.

[3060] I guess I've talked probably longer that I intended. Let me say in conclusion that I ask only that you fairly and fully consider all the evidence in this case. Listen to and apply the law as the Judge will give it to you,

particularly the matters of foreseeability, joint design, common design, aider and abettor which will be generally, if not precisely, in accord with what I've given you. Listen to all that. Apply that law to the facts as you find them to be, let the chips fall fairly and squarely where they may and to render a verdict that is just in this case, keeping in mind, however, that justice is a two-way street; justice not only for Clyde Daniel Wesley but justice also for Mary Jane Stout who died at the age of 54 last May; justice for her husband, Norman Stout, whose life will never be the same because of the tragic events in his house on May the 14th. I'm confident that if you do this, consider all the evidence and apply the law fairly and squarely to it you will reach verdicts of guilty as to each count and as to each specification of those counts, keeping in mind your job as to counts three, [3061] four and five.

I'll sit down for now. I will have an opportunity to talk with you a little later. I thank you for your attention. I would ask that you give Mr. Brown the same courtesy that you've given me. Thank you.

THE COURT: Gentlemen of counsel, I think at this time it would be a good idea if we stood up and stretch a little bit and moved our arms and muscles and then resumed our seats for the second chapter of the final argument.

MR. BROWN: Thank you, Your Honor.

May it please the Court, gentlemen of counsel, ladies and gentlemen of the jury, as Mr. Scott has indicated to you, this is the phase known as closing argument. It is the opportunity for us to outline in a similar manner to what we told you in opening statement we thought the evidence would show and now to outline in perhaps a mental checklist help you formulate, help you decide what the evidence did show; for us to show you what we believe the evidence did show.

Now, Mr. Scott indicated here today and

* * *

[3169] Boney, Sue Seley and Joanne Wade. Mrs. Cone, if you'll come forward or where you sit you're going to administer this oath?

(Whereupon, the above named individuals were administered the oath of sequestration.)

THE COURT: Thank you Mrs. Cone. The special Bailiffs and Court Constables then may desire to leave the courtroom or you may stay in the courtroom for the remainder of the proceedings. Thank you Mrs. Cone. If you wish, you may certainly leave. You certainly may stay, also.

Ladies and gentlemen of the jury, I took the opportunity that was afforded at this moment to prepare that order and to have the special Bailiffs and Constables present in court and you will hear more of their duties and you will see more of them from time-to-time. At this time, though, I have interrupted the proceedings insofar as the final argument is concerned. The State of Ohio began its final argument that was followed then in proper order by Mr. Brown for the defense and now Mr. Scott you may present the second phase of your argument or summation.

MR. SCOTT: Thank you, Your Honor. If it please the Court, [3170] gentlemen of counsel, ladies and gentlemen of the jury, I feel really rather certain that you are somewhat overwhelmed by all of the things that we've talked about up to this point so I don't intend to--I'm sure it will make you happy, to rehash every scrap of evidence that was heard in this case. You heard that evidence. My impressions are somewhat different from those of Mr. Brown but I trust your

good judgment and recollection. Keep in mind at the outset here, as I told you before, the critical time period of what happened in this case at that house is about three to four minutes from the time the shooting started til the time the shooting ended. That's what we're really down to. All the rest of it, everything that Mr. Brown paraded in front of you by stipulation or otherwise they knew we were going to get in evidence in through Texas officers. They knew we would get the evidence in through the Pennsylvania people. So, they simply stipulated it and made it easier and I appreciate that. It's not their generosity. They knew we could put that evidence on and get it in front of you. But all of those things focus down to two or three or four critical [3171] minutes when those shootings took place. Keep that in mind. Also keep in mind that we are down to three--I've heard nothing to change my mind, we are down to three basic issues in this case. Who shot Mary Jane Stout? Did this defendant have a purpose to kill at any time during the course of those events, as we'll talk about that a little more? And thirdly, if you have a problem with the proof that he shot Mary Jane, is he nevertheless involved as an aider and abettor under the law that he's equally guilty?

The Judge is going to charge you that if two people by common scheme or design set out to commit a crime each one is equally guilty with the other even though neither one committed every act constituting the offense. That's what aider and abettor is all about. Keep those things in mind.

Now, I do want to comment on two or three things that Mr. Brown brought up. He made quite a ta do about Edmonds' testimony and I don't understand why because everything Edmonds testified to the defendant, himself, confirmed that they did in fact get out of that car with [3172] a gun each of them, Stumpf and this defendant, for the purpose of going down there to steal something and that's all Edmonds really testified to. But keep in mind, also, that had

it not been for Edmonds at the outset in Texas identifying this defendant and identifying Stumpf, this case would never have been solved. We have a man from Pennsylvania, transients, a man from Pennsylvania and a man from Texas. If Edmonds would have kept his mouth shut this case would never, never have been solved. Keep that in mind also in considering what happened to Edmonds. Edmonds is not going to walk away. Edmonds is going to do 7 to 25 years for his involvement and the only involvement that we've heard from the witness stand other than somewhat speculative things is that he may have walked down into the garage and was ordered to get back out of there. Okay. That's far removed. Mr. Brown would have you believe that the involvement of Edmonds is the same as the involvement of this defendant. Far removed, I would say. So much for that.

The location of the shell casings. Perhaps, perhaps we learned a lesson. We always learn from doing things. It would have been better to [3173] marked each one where it was recovered, mark it out there and so on. It wasn't done. But I submit to you, use your good common sense, that you fire from an automatic pistol those shells are ejected, they're going to go anywhere. So, everybody agrees that the shooting of Mrs. Stout took place in bedroom number "2". Naturally we know there were at least five shots fired in that bedroom because four of them hit Mrs. Stout and one went in the wall. So, naturally there are at least five you would expect to find in there. Now, as far as the one in bedroom number "1", Mr. Brown would lead you to believe that's the only shot that was fired in there. It's not true. His own defendant admitted that and as he grabbed Mr. Stout to turn him around to keep him away from the guns on the bed Stumpf came in and shot him in bedroom number "1". That's one shot. Now we don't know whether the gun was pointed in this direction or this direction. It's conceivable that's the bullet or that's the cartridge over by the wall. However, there was another shot fired in that bedroom and that's the one that we have all the

geometric designs, but I don't care. I don't know much about geometry [3174] because I never did much in school, but be that as it may, I'm smart enough to know if that bullet entered the top of that mattress at a downward flight it wasn't discharged when it hit the floor. That gun was fired. The defendant conveniently says he didn't fire it, doesn't know how it got there. They'd be very happy if it wasn't there but there were at least two shots fired. Where's that other shell casing? It proves my point that they could go anywhere. The location of the shell casing doesn't necessarily have anything to do with where that gun was fired. All right. That's one thing.

The pathologist. The scientific evidence Mr. Brown says exonerates his client. What did the pathologist say? He said that he could not state the order in which those wounds were received. Granted, the bruising in the left breast area would indicate that there was some blood flow after that impact. Recall if you will, the pathologist said that she could have lived, if you call death the stopping of all body functions including the heart, she could have lived up to fourteen minutes is what he said. And I believe I asked him on redirect examination [3175] could that bruise have developed in that period of time and he said yes. So, it doesn't necessarily mean that that non-fatal shot was received first. However, assuming that it does, let's assume for the sake of argument that those two non-fatal shots were received first, how does that exonerate this defendant? Because what he told Eastman that there were shots fired and then they went back and shot her again. Only what he told Eastman was that he, himself, did it. Now he's saying Stumpf did it. So, the manner in which they were inflicted, that is, there was a return to the room, if you assume that's so, you're right back to square one. You either believe Eastman or you believe this defendant. Scientific evidence does not exonerate this defendant in that respect. Keep in mind, also, that the County Coroner did not do the autopsy. He referred it

to be done by Dr. Arejola and Dr. Arejola did not fill out the Coroner's report. He never even saw the Coroner's report. What is instant death? If I submit to you in a manner of speaking if you have two bullets fired into your brain and death is inevitable even though your heart may pump for [3176] up to fourteen minutes she have you died? There's nothing to be done to stop the natural course of events. The body just stops. Perhaps that's what the Coroner had in mind. He wasn't here to explain what he meant by instantaneous death but that wasn't the pathologist's language. That was Dr. Larrick's report. So, the scientific evidence does not exonerate this defendant.

Now, why would the defendant, assuming that what he told--let's talk about what he told Eastman. He said that Stumpf shot Mr. Stout and panicked. That's pretty much what Mr. Stout said as well, and dropped the gun and that he, that is, Wesley picked the gun up that Stumpf had dropped and shot Mrs. Stout. All right. What would lead you to believe that might be true or that that is true? Well, there's testimony which wasn't mentioned by Mr. Brown from Ron Dye that this gun of Wesley's jams because of the clip doesn't fit right. It's loose and it slips. The next round won't go into the chamber. That gun was fired in bedroom number "1", that bullet went into the mattress and you'll have that with you too. It had been fired once. Did it jam? Is that why he picked up the chrome [3177] gun? That's consistent. And I refer back once again to Norman Stout's testimony as he lay there in bedroom number "1" shot, unable to move, unable other than crawl around he heard a conversation between two people and then heard four shots. Is that not consistent with what Eastman said Wesley told him, that the man was shot, he picked the gun up and shot Mrs. Stout and he did go on and say she cried out and moaned and he went back and shot her again. Pretty consistent with what he's saying happened only he shifted gears and now is saying Stumpf did the shooting. You're just back to square one.

You're going to have to decide which of those is true as far as who shot Mrs. Stout. Let's talk about purpose to kill again. Mr. Brown would lead you to believe that the defendant admitted his Belmont County problem just to get everything off his chest, that he's an honest person and if he does wrong he wants to fess up to it. Perhaps. Perhaps. But I submit to you and he says it has nothing to do with this case. I submit it has a great deal to do with this case. It shows that he's not afraid or reluctant to shoot somebody, a passing motorist, that he [3178] didn't know by his own admission true or not that he wanted to steal his car, force the man off the road and steal his car. He didn't stop fast enough so he shot him. He shot him and he now knows he shot him in the head. The car wrecked. We don't know how he is now. Doesn't that show you a great deal about his state of mind, his propensity for violence? Having done that they say you do it the first time perhaps the second time is easier. Having done that he joins with Stumpf in a common design, if you don't like that word, joint venture, unlawful, felonious adventure to go to that Stout residence again armed with a loaded firearm, both of them. They went down there, he conceded to me on cross-examination, yes, with loaded guns it's foreseeable somebody's likely to be hurt or worse. Nevertheless they did so. Why did you have the guns? Well, to make them do what we wanted to, terrorize and coerce them is what he said, to subdue them, I think is what he said. I said what were you going to do if they resisted? Well, we could subdue them but nevertheless they had those guns out at all times during the course of this thing. Do you have any real doubt in your [3179] mind that he participated in those events? He hold Norman Stout by the arms, he got up and stood up right there and said I held him and turned him around in that bedroom "1" so that he couldn't get to those guns and that's when Stumpf came in and shot him. Is that not aiding or assisting Stumpf in an effort to kill Mr. Stout? There were two people in that house with handguns, both of those handguns were fired. I don't care if it was a ten degree angle or a 95 degree

angle, that gun was fired in that bedroom for a purpose. Given a situation like that where you're in the middle of an armed robbery, aggravated robbery and one of your victims decides not to cooperate and try to, wisely or not, resist and he knocked him aside to the point where he says he dropped his gun, you're faced with a problem and you shoot. Why are you shooting? Why are you shooting and what is your purpose at the time you shot? I submit even though only one gun fired any bullets that hit anybody, both guns were fired and both guns were fired for a common purpose, that's the purpose to kill at that point. Maybe, maybe at the time this thing started out he didn't [3180] have the intent to kill but that's not the question as they walked down the bank or as they walked up to that door and said we've got car trouble and all that. Maybe not. But the question that you have to resolve is what was his purpose at the time the shooting occurred, not before.

Talk about the demeanor of a witness, I have never seen as cool a customer as this man. No remorse. Even admitted his first concern after two people are shot was to gather up those guns because he wanted to steal them, he handled them carefully so they wouldn't get scratched. The thought never occurred to him to see if he could assist those people. Never occurred to him He mentioned something about well, I said what were you going to do if they to try to stop them from reporting this stolen car? Going to tie them up. Well, why didn't they? Why did they keep their guns drawn at all times in that house on those two people at their mercy? Somebody said, well, he said, Don Brown said, why didn't she get up and run. Can you imagine the terror in that poor lady's mind? She's been subjected to gun point for a half and hour or so, she's [3181] been herded back into the bedroom, she's seen her husband shot in front of her eyes, what would you do? I don't know what I would do but I think it's very reasonable that I might just do what she did,

apparently nothing, frozen. Is that an unreasonable conclusion?

Mr. Brown is doing his level best to divorce Clyde Daniel Wesley from John David Stumpf but it won't wash. They went there together for the admitted felonious purpose of stealing committing an armed robbery, if you will, a theft while armed understanding and recognizing the dangers of loaded firearms under such circumstances and the possibility foreseeability and the Judge will talk to you a little bit about that, death was likely to occur yet he wants this jury, wants you folks to believe he was just a bystander and just as I anticipated I'm an honest good ole boy, I'll admit when I do wrong. I did wrong by going there with a gun to commit a theft. I did wrong by stealing a gun and I did wrong by stealing a car but since I didn't do those other I'm not admitting it. That's what they're asking you to believe. I submit to you, you give a little in an effort to save a lot. That's what [3182] amounts to.

James Eastman has been raked over the coals, perhaps he deserves it. But the question, again, is not whether he's a nice guy or why he testified or why he told Mr. VanHorn what he had heard. Perhaps it was to save his neck. Maybe he thinks he'll get a break. No testimony that he has. I can tell you that he hasn't. But that's not the point. The point is not why he testified. The point is did he testify truthfully. Recall if you will at least as I understood it, Mr. Brown would have you believe that there was no conversation between the two of them yet the defendant admits there was a conversation, finally. First he said I just summarized from the transcript of the other trial then when he found out that some of the things about the lady moaning and going back and shooting her a second time was not in that transcript and then he said, well, maybe I added some things from my own knowledge, maybe he did, at least talked to him. The question is did he tell him what Eastman told you he told

him. That's the question for you. The scientific evidence does not answer that question for you. She could have died from any one of [3183] those shots in any order. That is, the two head shots in any order and the bruising would have occurred but assuming it didn't it's still consistent with what Eastman said this man told him as well as the story the defendant told you.

Keep in mind what I said to you before, you're going to have to conclude from all of the evidence the manner in which this defendant conducted himself, the weapon he had and used, fired in the--he said it was never out of his hand except when he dropped it and picked it up so it was fired, he had to fire it. He's not admitting it but he had to fire it. He fired it in a downward trajectory ten degrees, fifteen degrees, whatever, I'm smart enough to know it entered the top of that mattress and not the side of it, it had to be going down. If it fired from above you don't do that and it was fired generally from that doorway. Did he take a shot at Mr. Stout when he was confronted with him there? Now he didn't want to, like he said, I didn't really mean to shoot that man in Belmont County. I just pointed the gun at the driver's window and pulled the trigger but I didn't really mean to hurt him. That's what he's having you [3184] believe here now. I won't belabor the point.

Do not be sidetracked into minor details that really don't make much difference. For example, whether the hood of the car was up or not. This man admitted the hood of the car was up and Edmonds' testimony they've tried to challenge that but the man admitted this defendant admitted that the angle of the bed, so what. Those things are smoke screens to divert your attention from the three things, as I see it, that you really need to decide. Who shot Mary Jane Stout. Did the defendant by his actions indicate what his purpose was, purpose to kill. I submit there's plenty of evidence of that. And, thirdly, if you have a problem in doing the

shooting, did he nevertheless participate with another in the commission of the crimes as an aider and abettor as the Judge will tell you about. If he did, he can be found--he should be found guilty of all crimes and all specifications but one and that's the third specification to the aggravated murder which he must be found to be the principal offender. Every other charge the State does not need to prove that he fired that fatal shot into Mary Jane Stout's body. [3185] If he was there with the purpose to kill and he aided, assisted, encouraged, the Judge will tell you about that, another person to do that and that person did in fact do so he's guilty. Classic example, a person who drives the getaway car to stick-up a gas station, stays in the car, death occurs, he can be guilty of murder, aggravated murder because he participated in the unlawful felonious common design with other persons with a purpose to do so. That's what we have here. I won't belabor it any more.

I appreciate your attention. It's up to you now. I'm sure you don't want to hear all the evidence from my point of view because you heard it before. Let it fall where it will.

One comment. You probably will be instructed with regard to the first count, the aggravated murder count, that if you first find that the State's failed to prove the charge of aggravated murder you will then go on and consider the lesser charge of felonious assault but only if you first find the aggravated murder has not been proven beyond a reasonable doubt, which I can tell you that the Judge will tell you that your obligation is to fully and fairly consider

* * *

IN THE COURT OF
COMMON PLEAS
IN AND FOR THE FIFTH
DISTRICT COURT OF
APPEALS, GUERNSEY
COUNTY, OHIO

STATE OF OHIO :

Plaintiff, :

vs. : CASE NO. 9692

CLYDE DANIEL WESLEY :

Defendant.: PART IV

Transcript of the Proceedings held on April 8, 9, 10, 11, 12, 15, 17, 17, 18, 22, 23, 24, 25, 26, 27 and May 2 and 6, 1985 before the Honorable John E. Henderson, Judge.

APPEARANCES:

C. Keith Plummer
James R. Scott
Prosecuting Attorneys
139 W. 8th St.
Cambridge, OH
For the State.

Donald D. Brown
Sam R. Raptis
Attorneys at Law
Guernsey Savings & Loan Bldg.
Cambridge, OH
For the Defendant.

FILED COMMON PLEAS COURT
1985 DEC 2 AM 9:02
CLERK OF COURTS GUERNSEY COUNTY

* * *

[3186] the evidence. Excuse me, I meant involuntary manslaughter. Involuntary manslaughter, you will be instructed on involuntary manslaughter, as a lesser offense. You can not and should not consider that lesser charge until you decide or if you decide that the principle charge of aggravated murder has not been proven. Your obligation is to consider that charge fairly and fully and not to take the opportunity to consider the lesser charge to avoid the aggravated murder charge. The Judge will tell you about that too.

I thank you for your attention. I appreciate it. Let the chips fall where they will. Carefully consider all of the evidence. Keep in mind the only person on trial in this courtroom is Clyde Daniel Wesley. It's not Norman Leroy Edmonds and it's not John David Stumpf. The penalties imposed in those cases have nothing whatsoever to do with this case. It's up to you to determine what this defendant has been proven guilty of and to return your verdict accordingly. Thank you.

THE COURT: Ladies and gentlemen of the jury, that concludes the final arguments now. The next part in this

* * *

IN THE STATE OF OHIO :
:
COUNTY OF SCIOTO :

AFFIDAVIT

JOHN DAVID STUMPF, being first duly sworn according to law, states the following:

1. I was represented by Lewis Tingle and Craig Stephens at trial.

2. I talked to Mr. Tingle pretty often, but I only really talked to Mr. Stephens one time prior to trial.

3. My family originally tried to hire Mr. Tingle after he was recommended to us by Lt. Van Horn. We did not have enough money. Later he was appointed to represent me by the court.

4. I saw Mr. Tingle fairly often. We mostly talked about my case. Mr. Stephens was appointed later. I did not see Mr. Stephens very much.

5. We began to pick a jury for my trial. Then Mr. Tingle told me that a police officer had been shot and killed. He told me to waive the jury so I could get a trial to judges who would be more fair. I did not know how the judges would be picked.

6. Mr. Tingle did not talk to me about a plea until a few days before my trial was scheduled. He was the only lawyer present when we talked about the guilty plea.

7. I saw my family often while waiting for my trial to begin. They were not there when I made my plea. I was not able to discuss the plea with them prior to its being made.

8. The only time I really remember talking to Mr. Stephens was when Mr. Stephens told me that he had hired an investigator to find out what had happened in Canonsburg.

9. Mr. Tingle told me that I should plead guilty to the reduced charges. I thought that the specifications that were dropped meant that I could not get the death penalty.

10. We were going to start the trial before the three judge panel. After the recess I was told to plea. I asked my lawyer what he was talking to the prosecutor about. He said it was none of my business. He brought some papers into the room and told me that the prosecutors were dropping the specifications.

11. Mr. Tingle told me that I would not get the death penalty. I did not understand all legal terms. Mr. Tingle told me to look at him if I did not understand or know how to answer a question and he would indicate how to answer.

12. During the plea, I would look at Mr. Tingle when I was not sure what to do. He would indicate whether I should answer yes or no by nodding or shaking his head.

13. I did not understand the nature of the charges to which I was pleading.

14. At one point the judges asked me if I was in fact guilty. I wanted to explain myself. Mr. Stephens then answered for me.

15. I did not think that I was pleading guilty for personally killing Mrs. Stout.

16. I did not understand the purpose of the hearings after my plea. I did not know that I would go through a trial. Mr. Tingle told me that it was standard procedure.

17. I never understood what mitigation meant. The lawyers did not talk to me about mitigation before my trial. I did not know who would testify. He did not ask me who I wanted to testify.

18. I thought the purpose of the hearing was to put on character witnesses.

19. After the sentence, I asked Mr. Tingle how I got the death penalty. He said we would win on appeal.

20. I met Clyde Daniel Wesley when I was ten or eleven years old. We knew each other very well.

21. We spent a lot of time together until we were fourteen or fifteen years old. Then Danny Wesley went to a boys' home in Newcastle.

22. I worked with Danny again a few years later. We worked at a tire store together.

23. I started to use drugs at age fourteen. I started to smoke marijuana and drink alcohol about this time.

24. I later began to use speed, quaaludes, acid, and later cocaine.

25. I never had to use drugs.

26. I smoked marijuana and drank alcohol every day. I used other drugs mostly on weekends.

27. I have taken up to eleven quaaludes at a time. Sometimes I had to miss work because I was high.

28. On the morning before this case happened I had had a hit of acid. I might have had a hit on the morning before we left to Cambridge. I do not remember how much beer we drank.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ John D. Stumpf
JOHN DAVID STUMPF

SWORN TO AND SUBSCRIBED before me
this 10 day of October, 1988.

/s/ David A. Doughety
NOTARY PUBLIC
Attorney – State of Ohio
My commission has no expiration date.

IN THE STATE OF OHIO :
: ss.
COUNTY OF LUCAS :

AFFIDAVIT

I, CHARLOTTE GILBERT, being first duly sworn according to law, depose and state as follows:

1) I was one of the social workers who assisted Lewis Tingle and Craig Stephens in preparing mitigation in the case of State of Ohio v. John Stumpf, CR-9684, Guernsey County, Ohio.

2) Debbie Starkey originally contacted me to assist her with Mr. Stumpf's case.

3) Debbie Starkey and I met with Mr. Tingle for the first time on September 6, 1984. Mr. Tingle gave us some information about John. however, the information Mr. Tingle provided about the actual offense was fairly vague.

4) On September 8, 1984, I reviewed the information provided to me by Mr. Tingle.

5) On September 10, 1984, I interviewed John Stumpf for the first time. I also met with Mr. Tingle, again.

6) On September 11, 1984, I went to Canonsburg, Pennsylvania and interviewed some of John Stumpf's family members, neighbors and teachers. I obtained John's school and hospital records.

7) On September 11, 1984 I spoke with Debbie Starkey by phone and prepared a questionnaire.

8) On September 12, 1984, I distributed some questionnaires in Canonsburg, contacted a few of John's employers, and two of John's friends.

9) On September 13, 1984, I spoke to several members of the Dino family and collected questionnaires. The same date, I discussed the case with Debbie Starkey and interviewed John's stepfather, mother and stepmother by phone. I also began writing a social history. On September 14, 1984, I completed the social history and met with the attorneys.

10) On Septembers 16, 1984, I met with Debbie Starkey. We reviewed questionnaires and prepared a witness list.

11) On September 17, 1984, Debbie Starkey and I met with Mr. Tingle. We reviewed the questionnaires and completed a witness list.

12) On September 19, 1984, Debbie Starkey and I met with Mr. Tingle and Mr. Stephens.

13) On September 20, 1984, I interviewed witnesses and assisted the attorneys in the courtroom.

14) It was my understanding that the social history was to be presented to a psychologist and that a psychologist would evaluate John Stumpf.

15) I did not feel that we had adequate time to properly investigate John's background.

16) Our time was cut even further when the attorneys decided that John would enter a guilty plea. The

decision was made because it was to "iffy" as to who had which gun.

17) John did not want to enter a guilty plea.

18) The attorneys, Mr. Tingle and Mr. Stephens, would tell John what to do. John would go along with whatever the attorneys told him.

19) The attorneys wanted certain information cut from the social history. They wanted no mention of drug and alcohol usage. The attorneys also did not want to present evidence of the relationship between Dan Wesley and John Stumpf, particularly about any past criminal involvement.

20) John's attorneys spent almost no time in witness preparation. On the day of the mitigation hearing, a large number of people came from Canonsburg to Cambridge to testify on John's behalf. Debbie Starkey, an assistant of hers, and I interviewed the witnesses. Mr. Tingle spoke to them briefly as a group.

21) The attorneys wanted older people to testify, such as John's friend's parents. They did not want anyone to testify who could relate any information about John's use of drugs and alcohol.

22) Debbie Starkey suggested that the attorneys call officers from the Guernsey County Jail to testify about John's adjustment to jail but the attorneys did not do this.

23) The attorneys were afraid that if they called too many witnesses, it would anger the judges.

24) When Mr. Tingle and Mr. Stephens prepared John for his unsworn statement, they focused on the facts. There were no discussions about John's feelings about the incident or his background.

25) I do not remember talking to John's natural father.

26) I do not remember obtaining records from the probation department in Washington County.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Charlotte Gilbert
CHARLOTTE GILBERT

Sworn to and subscribed before me
this 6th day of October, 1988.

/s/ Lora J. Beckwith
NOTARY PUBLIC
My comm. expires 6-13-90

IN THE STATE OF OHIO :
: ss.
COUNTY OF CUYAHOGA :

AFFIDAVIT

Scott P. Kenny, having been duly sworn and cautioned, states the following:

1) My name is Scott P. Kenny, and I reside at 20029 Sussex Road, Shaker Heights, Ohio 44122.

2) I am a graduate of Case Western Reserve University School of Law (1975).

3) I am licensed to practice law in the State of Pennsylvania (1975) and the State of Ohio (1976).

4) I was employed by the Ohio Public Defender Commission from 1979 until 1986, serving as Chief Trial Counsel for the last five years. My job responsibilities included the training and supervision of trial attorneys employed by the commission.

5) I have represented in excess of ten capitally indicted defendants under the present death penalty statute.

6) I have attended hundreds of hours of capital litigation continuing education programs throughout the county.

7) I have lectured on capital litigation and trial strategy subjects for continuing education programs in Ohio.

8) I have testified on the subject of effective representation in Ohio and Indiana.

9) In August of 1984 I was an employee of the State Public Defender Office.

10) I was notified by David Stebbins, also of the Public Defender Office, that Lewis Tingle's law clerk had contacted the office requesting assistance in the case of John David Stumpf.

11) I spoke with Mr. Tingle approximately a week prior to the start of trial.

12) Mr. Tingle told me that the decision had been made to waive a jury trial and try Mr. Stumpf to a three judge panel.

13) Mr. Tingle mentioned that he was considering a guilty plea to avoid the husband of the victim testifying at the mitigation phase.

14) I advised Mr. Tingle that the husband, Norman Stout, could not testify at the mitigation phase. However, should a guilty plea be entered, I further advised Mr. Tingle that the prosecution could and probably would have Mr. Stout testify at a hearing conducted pursuant to Criminal Rule of Procedure 11(C) (3) and R.C. 2945.06. Therefore, a guilty plea would render his strategy ineffective.

15) I believed that Mr. Tingle had decided to pursue a trial. I had explained to him that he had a good chance to prevail on some important issues and avoid the death penalty.

16) I strongly advised Mr. Tingle to have the court appoint a behavioralist or psychologist to explain how Mr. Stumpf became involved in the incident. I told him that Mr. Stumpf had a right to such an expert.

17) The next time I talked to Mr. Tingle he told me that he had decided not to use a psychologist. He said that John did not suffer from a mental disease or defect.

18) I told Mr. Tingle that the help of a psychologist was necessary even though John was not suffering from a mental disease or defect.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Scott P. Kenny
SCOTT P. KENNY

SWORN TO AND SUBSCRIBED before me
this 10th day of October, 1988.

/s/ Karen L. Pallat
Karen L. Pallat, Notary Public
State of Ohio
My commission expires April 12, 1989

STATE OF PENNSYLVANIA :
: ss:
WASHINGTON COUNTY :

AFFIDAVIT

LESA WOOD, first being duly sworn according to law, deposes and states as follows:

1. I am John Stumpf's younger sister.

2. In 1984, when John's case was pending, I first met Mr. Tingle, John's attorney, when I visited John at the Guernsey County Jail. When we were introduced, we did not discuss anything about John's case.

3. The next contact I had with Mr. Tingle was when a group of John's family members and friends went to Cambridge to testify. We met at Mr. Tingle's mother's house. A social worker spent about five or ten minutes talking to us asking very general questions about John. I told the social worker about John's use of drugs and alcohol.

4. John's attorney told us that John could not get the death penalty because he plead guilty. We had completely erased in our minds the death penalty as a possibility. We knew John could get twenty or thirty years.

5. John told me that his attorney was not really explaining things but had said that the prosecutor would drop the smaller aggravating circumstances and he wouldn't get the death penalty.

6. I waited outside the courtroom but the attorneys never called me to testify. The attorneys never explained to me why I wasn't called as a witness. There were other people there that weren't called either, my

husband, Betty Beiletti, Darla Spiker, Helen Procacina and Tony Kohn.

7. I think the attorneys made a point of having mom testify last. I heard them tell her to give short answers, but the attorney didn't tell her what kind of questions he would ask.

8. Two weeks before trial I remember that the Dinos and my mom passed out and collected questionnaires to everyone who knew John. I thought the questionnaires were supposed to give the judges some kind of insight into the type of person John is. Then the attorneys told mom to get in touch with people who could testify for John.

9. When I visited John in jail, the officers treated John very well. When the family visited they would leave us alone. The officers didn't handcuff John when they took him to his attorney's office. They seemed to trust him. I was allowed to go into the jail to cut John's hair a couple of times. I don't remember any discussions about the officers testifying on John's behalf.

10. John is out-going. He would try to make you laugh before anything. John is always willing to help. It's just his nature. He is a good listener.

11. Punky raised us. He's my dad. Our natural father took us to Ohio a couple times in the summer. I think we all just blocked him out. I don't remember John talking about his feelings about our natural father's absence. I saw my real father for the first time in eleven years at John's sentencing.

12. Our family is pretty close. We did things together. There were some tough times financially, though.

13. My mom's dad died of alcohol consumption. She and Punky never kept alcohol in the house.

14. Danny Wesley is a quiet person. Some people would call him sneaky quiet. Punky never liked Danny. He didn't trust him.

15. John hadn't seen Danny for four years before they got into this trouble. Right before this happened, I saw Danny at the Stop-n-Go store. He was alone. Danny had a whole bunch of joints in a bag. I thought he was high.

16. When I visited Cindy and Danny in Oklahoma one summer we all went for a ride in their truck. Danny kept guns in the truck. As we were driving along Danny took out a big hand gun and started shooting out the window at trees. I was really shocked. This is the first time I had actually seen a gun fired. Danny had a little handgun in the house, too.

17. John dated a lot of women. He treated them well, but he never had a real committed relationship.

18. John started drinking when he was 16 years old. John smoked pot almost every day. One time Punky caught him with a bag of pot and threw him out of the house. John went to live with John Dino, Jr.

19. John was a silly drunk, not aggressive or violent. He was the life of the party. Alcohol and pot would bring him out of his shell. John used quaaludes about once a week. When he did them with alcohol, he was comatose. I think he has tried acid, too.

20. Everybody was doing drugs at the time. It was the thing to do.

21. John didn't have much interest in school. He just didn't apply himself. John was held back in seventh grade. I think this contributed to John's "I don't care" attitude about school. When we moved when John was in high school, John had to go to a new school. He didn't know anybody. I think this is part of the reason he quit.

22. John has a lot of friends and family who love him and miss him very much. John is applying himself now, doing what he should have done when he was in school. This trouble has matured John.

/s/ Lesa Wood
LESA WOOD

Sworn to and subscribed before me this 2nd day of October, 1988.

/s/ Michel A. Coconis
Notary Public
MICHEL A. COCONIS
Notary Public – State of Ohio
My commission expires Jan. 29, 1993